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Supreme Court of the United States

OCTOBER TERM, 1937—No. 636

ELECTRIC BOND AND SHARE COMPANY,
AMERICAN GAS AND ELECTRIC COMPANY,
AMERICAN POWER & LIGHT COMPANY,
NATIONAL POWER & LIGHT COMPANY,
ELECTRIC POWER & LIGHT CORPORATION,
UNITED GAS CORPORATION,
POWER SECURITIES CORPORATION,
LEHIGH POWER SECURITIES CORPORATION,
UTAH POWER & LIGHT COMPANY,
NEBRASKA POWER COMPANY,
PACIFIC POWER & LIGHT COMPANY,
UNITED GAS PUBLIC SERVICE COMPANY,
HOUSTON GULF GAS COMPANY,
APPALACHIAN ELECTRIC POWER COMPANY,
ATLANTIC CITY ELECTRIC COMPANY,
EASTON CONSOLIDATED ELECTRIC COMPANY,
THE OHIO POWER COMPANY,
PENNSYLVANIA POWER & LIGHT COMPANY,
THE SCRANTON ELECTRIC COMPANY,
THE WASHINGTON WATER POWER COMPANY,
CENTRAL ARIZONA LIGHT AND POWER COMPANY,
INDIANA & MICHIGAN ELECTRIC COMPANY,
IDAHO POWER COMPANY,
THE MONTANA POWER COMPANY,
SPOKANE UNITED RAILWAYS,
SPOKANE CENTRAL HEATING COMPANY and
MONTANA POWER GAS COMPANY,
Defendants-Petitioners,

against

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Respondent,

and

HOMER S. CUMMINGS, individually and as Attorney General of the United States, JAMES A. FARLEY, individually and as Postmaster General of the United States, and JAMES M. LANDIS, ROBERT E. HEALY, GEORGE C. MATHEWS, JAMES D. ROSS and WILLIAM O. DOUGLAS, individually and as constituting the Securities and Exchange Commission,
Cross-Defendants-Respondents.

BRIEF FOR PETITIONERS.

THOMAS D. THACHER,
JOHN F. MACLANE,
Solicitors for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1937—No. 636.

ELECTRIC BOND AND SHARE COMPANY, *et al.*,
Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION, *et al.*,
Respondents.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the District Court (R. VIII, 2172-2213)[1] is reported in 18 F. Supp. 131. The opinions in the Circuit Court of Appeals (R. VIII, 2315-2335) are reported in 92 F. (2d) 580.

Jurisdiction.

The jurisdiction of this Court has been invoked under Section 240(a) of the Judicial Code as amended by the Act

[1] The record in this Court is embraced in eight volumes. The first seven volumes contain the record presented to the District Court; Volume VIII contains the additional record made in that court subsequent to the hearing (opinion, findings, decree, appeal papers), as certified to the Circuit Court of Appeals, and the proceedings in the Circuit Court of Appeals. Citations to pages of the record will give the volume number in Roman numerals.

of February 13, 1925, c. 229, §1, 43 Stat. 938 (28 U. S. C. A. §347(a)). The order of the Circuit Court of Appeals affirming the decree of the District Court was entered November 15, 1937 (R. VIII, 2335). Writ of certiorari was granted by this Court on January 3, 1938.

Statute Involved.

The statute involved is the Public Utility Holding Company Act of 1935. This Act is Title I of the "Public Utility Act of 1935", approved August 26, 1935, entitled "An Act to provide for control and regulation of public-utility holding companies, and for other purposes." Title I is designated the "Public Utility Holding Company Act of 1935" (sec. 33), and is entitled "Title I—Control of Public-Utility Holding Companies." Title II, by section 320 thereof, is given the short title "Federal Power Act." These titles are independent of each other. Title II is in no way involved in this suit. Unless otherwise noted, the words "the Act", as used in this brief, refer only to Title I—the "Public Utility Holding Company Act of 1935." A copy of the Act is printed in the Appendix (p. 150, *infra*).

The Questions Presented.

(1) Whether defendant holding companies may be enjoined from engaging in interstate commerce or from using the mails and instrumentalities of interstate commerce in the performance of their normal business activities and from owning securities in subsidiary companies carrying on like activities, in accordance with the provisions of sec-

tion 4(a) of the Act, unless they shall register with plaintiff, Securities and Exchange Commission, under section 5(a) thereof.

(2) Whether the Act, including sections 4(a) and 5, is not void as a whole because its inclusive definitions and provisions extend, without distinction, to persons and to acts without, as well as to those within, the constitutional authority of Congress.

(3) Whether section 4(a) is not unconstitutional and void because it conditions the right to use the mails and facilities of interstate commerce in normal business transactions upon registration and consequent submission to a multitude of prohibitions, regulations and penalties which have no relation to the regulation of interstate commerce or of the mails, which violate the Fifth and Tenth Amendments to the Constitution of the United States and are an unconstitutional delegation of legislative power.

(4) Whether section 4(a) does not contravene the Fifth, Sixth and Eighth Amendments to the Constitution of the United States because, as a penalty for failure to register, it deprives certain of the petitioners of their ordinary civil rights to use the mails and facilities of interstate commerce and by section 18(f) is enforceable, as a penalty, by injunction and without trial by jury, and is so enforced by the decree affirmed in the court below.

(5) Whether sections 4(a) and 5 of the Act, which require registration and the filing of certain information with the Commission after registration, constitute a separable system of regulation, or whether they are merely auxiliary

to the system of regulation prescribed by subsequent sections of the Act applicable solely to registered holding companies.

(6) If section 5(b) is to be construed as a separable regulation sufficient in itself (if valid) to support the penalties of section 4(a), whether it is not invalid because it is not a regulation of commerce or of the mails or because it violates the Fifth or Tenth Amendments to the Constitution, or because it is an unconstitutional delegation of legislative power.

(7) If sections 4(a) and 5 are not independent but are auxiliary to the substantive system of regulation,

(a) whether this system, specifically prescribed by sections 6 to 13 inclusive, constitutes as a whole or in any separable part thereof a valid regulation of commerce or of the mails, and

(b) whether each of the substantive regulations of sections 6 to 13 inclusive violates the Fifth or Tenth Amendments or is an unconstitutional delegation of legislative power.

(8) Whether, if registration may be required as in effect required by the decree affirmed in the court below, petitioners or any of them by their cross-bill may presently draw in question the constitutionality of any of the substantive regulations of sections 6 to 13 inclusive to which upon registration they are subjected by the Act.

(9) If so, whether any of the substantive regulations imposed upon registered holding companies and their sub-

sidiaries by sections 6 to 13 inclusive thus drawn in question are not regulations of the mails or of interstate commerce, are violations of the Fifth or Tenth Amendments, or are improper delegations of legislative power.

Statement of the Case.

(a) Formal Proceedings.

The case is here on certiorari to review a decision and order of the Circuit Court of Appeals for the Second Circuit entered November 15, 1937, affirming a decree of the District Court for the Southern District of New York entered March 8, 1937 (R. VIII, 2260-2265) against petitioners.

The suit was instituted by the plaintiff Securities and Exchange Commission, hereinafter called "the Commission", pursuant to section 18 of the Act, to enjoin certain of the defendants from violating section 4(a) thereof and to require them to register by filing a notification of registration pursuant to section 5(a) (R. I, 63).[1]

The original defendants were Electric Bond and Share Company, hereinafter called "Bond and Share", and certain associated public utility holding companies. The other defendants, added by intervention, are subsidiaries of one or more of the original defendants. Some of them are holding companies which are also public utility operating companies, some are public utility operating companies, and some are engaged solely in non-utility business. The answer (R. I, 93-124) included a counterclaim and cross-bill seek-

[1] Unless more accurate description is required, the parties will be referred to by their positions in the District Court, the respondents here as plaintiff and cross-defendants, and the petitioners here as defendants.

ing an injunction restraining the enforcement of the Act or a declaratory judgment that it is unconstitutional, and brought in as cross-defendants the Attorney General, the Postmaster General and the individual members of the Commission (R. I, 124-200), all of whom appeared, waiving objections to venue and lack of service. By order of court (R. I, 205) they were made parties and duly filed their reply to the counterclaim and cross-bill (R. I, 219-260), by which, in substance, they contended that it stated no presently justiciable controversy.

The facts were stipulated. The stipulation is incorporated in Volumes II and III of the printed record, and the exhibits which were made a part of the stipulation are printed in Volumes IV to VII, inclusive, of the record.

Upon final hearing, no further evidence being taken, the court granted the prayer of the bill and dismissed the cross-bill and counterclaim. The stipulation was approved as a proper narrative statement of the evidence, in compliance with Equity Rule 75 (R. VIII, 2308).

All of the original and intervening defendants joined in the appeal to the Circuit Court of Appeals for the Second Circuit, where the decree was affirmed (R. VIII, 2335), and joined in the petition for certiorari to this Court.

(b) General Nature of the Suit.

The Act became effective on December 1, 1935. In November of that year the public utility holding companies of the country were faced with a serious choice: they had either voluntarily to subject themselves to the most stringent and drastic regulatory legislation ever enacted by Congress with respect to any industry—or they had to resist its enforcement. Most of the companies selected the

latter course and some forty-seven separate injunction suits were instituted.

Faced with this situation, the officers of the Government commenced this action against Electric Bond and Share Company and associated holding companies for the express purpose of confining all the litigation to this one "test case" in which, as the Attorney General stated, "the constitutionality of the Act" might be determined.[1] By reason of the commencement of this action, and public disclaimer, by the Commission, the Attorney General and the Postmaster General, of any intention to impose penalties for violation of the Act pending final determination of this suit by this Court, the Government succeeded in having most of the other pending suits either dismissed or stayed. See *Landis* v. *North American Co.*[2] The litigation concerning the Act has, therefore, as the Government desired, been confined to this one case—but it has been far from the effective and fair test of the "constitutionality of the Act" which the Government purported to be seeking. Instead, it has become a battle of formalistic contentions which ignore practical realities and the vital issues actually involved.

If we disregard formalism, the case is a very simple one: the Congress has passed an Act regulating and controlling all aspects of the business of holding companies and their subsidiaries (except the rendition of utility service) even to the point of their destruction. The holding companies, firmly believing that this Act violates their constitutional rights, have refused to submit to it. The federal agency charged with enforcement of the Act, has, therefore, brought this suit to compel such subjection. On the bill and answer

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[1] R. II, 271-274, IV, 641-651.
[2] 299 U. S. 248 (1936).

in this suit, the issue involved is solely whether the Act, or enough thereof to accomplish its general plan and scope, is or is not constitutional and whether or not, therefore, such subjection may be compelled.

The Government has hitherto refused to meet this issue. It has taken one isolated provision of the Act—a provision which is purely informatory and auxiliary to the substantive regulatory system (which we refer to throughout this brief as "the control system")—and has urged that, whether or not the control system be constitutional, this provision is none the less valid and the defendants may, therefore, be required to submit to the entire Act without any determination as to the validity of the control sections.

The Government has similarly avoided the issues raised by the counterclaim and cross-bill of the defendants filed for the purpose of procuring an adjudication that the control provisions of the Act, applicable to them immediately upon submission, are invalid, if on the bill and answer no such determination be obtained. It has urged that these questions are hypothetical because submission, although required by the decree in the main case, is not yet an accomplished fact.

The Government is seeking to avoid, and the defendant holding companies to secure, a test of the substantive provisions of the Act which become applicable immediately upon compliance with the decree. That is the real issue between the parties. It is no answer to say, as the courts below have done, that the defendants must first submit and may later litigate. Submission cannot be compelled if, as defendants contend and as the Government and the courts below have refused to consider, all the principal features of this law are unconstitutional. Later litigation cannot mitigate the damage now being caused, and which will continue

to accrue, until a determination is secured that the immediately applicable control sections of this Act are invalid.

(c) Description of Defendants and Their Business.

Bond and Share was the moving spirit in the original organization, and owns substantial minorities of the voting stocks, of American Gas and Electric Company (American Gas) (17%), American Power & Light Company (American Company) (21%), National Power & Light Company (National Company) (47%) and Electric Power & Light Corporation (Electric Company) (47%).[1] These companies, in turn, own directly or through sub-holding companies substantial majorities, in some cases approximating complete ownership and in all cases sufficient to insure voting control, of the common stocks of operating gas and electric utilities.[2] Charts showing intercorporate structure are shown in the record.[3]

Among these operating companies are included defendants Utah Power & Light Company, Nebraska Power Company, Pacific Power & Light Company, United Gas Public Service Company and Houston Gulf Gas Company, which are referred to throughout the record as holding-operating defendants, because at the time of the entry of the decree,

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[1] Bond and Share also owns 44% of the voting stock of American & Foreign Power Company Inc. which owns, directly and indirectly, voting securities in foreign operating companies in sufficient amounts to give it voting control (R. VIII, 2221). This corporation is not a party to this suit.

[2] While immaterial to the decision in this case, statements in Judge Manton's opinion with reference to the interrelationships of the defendants are inaccurate in many particulars (R. VIII, 2316-2317). These interrelationships, except for changes subsequent to the findings of the District Court shown in the note on the following page, are accurately described in those findings (R. VIII, 2217-2222).

[3] Ex. 9, R. VII, 2085-2094.

in addition to being operating electric or gas utilities, they also owned controlling stock interests in local subsidiary utilities. The remaining defendants and intervening defendants in the case are either holding-operating companies which have been exempted for the time being by the Commission under section 3(a) from their obligations as holding companies (but not as subsidiaries), subsidiary public utilities, or subsidiary non-utilities.[1]

All these defendants and intervening defendants, and all their numerous public utility and non-utility subsidiaries, constitute by definition (sec. 2(a)(9)) a single holding company system, of which Bond and Share is the top company.[2]

Bond and Share owns no stock of any companies in the system, other than as above stated, except that it owns 7% of the voting securities of United Gas Corporation, a subsidiary of Electric Company, which at the commencement

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[1] Since the entry of the decree, the following holding company defendants, through internal corporate reorganizations, have ceased to be holding companies within the statutory definition incorporated in the decree: United Gas Corporation, United Gas Public Service Company, Houston Gulf Gas Company, Power Securities Corporation, Nebraska Power Company, The Washington Water Power Company, Appalachian Electric Power Company and The Scranton Electric Company. The latter three were exempted holding companies at the time of the decree and were so described in the findings (R. VIII, 2219). All these defendants remain affected by the decree, however, as subsidiaries of holding companies required to register thereby.

[2] For detail, see findings 8-12, R. VIII, 2218-2222. For brief description of all the utility subsidiaries of these companies and location and general scope of their operations, see stipulation as follows:

American Company and subsidiaries, R. II, 304-308;
Electric Company and subsidiaries, R. II, 310-313;
United Company and subsidiaries, R. II, 316-318;
National Company and subsidiaries, R. II, 320-324;
American Gas and subsidiaries, R. II, 430-433.

of the suit was a holding company but is now solely an operating company.

Except within the American Gas system and in occasional instances in the other holding company systems,[1] the only connection between the companies comprising this "system" is stock ownership of the parent companies in their subsidiaries and the service arrangements hereinafter described. There are neither common officers, directors nor employees.[2] The subsidiaries are separately incorporated, with their own staffs and their own directors, and transact their own business. Their immediate holding companies perform no other function than to own and vote their stocks and, from time to time, to own bonds and notes, to receive interest and dividends, and to disburse funds derived therefrom in payment of their own obligations, and, as dividends, to their stockholders.[3]

Bond and Share, until shortly prior to the institution of this suit, rendered services to both holding and operating companies under service contracts. Between the date of approval of the Act and the commencement of this suit, Bond and Share formed a subsidiary, Ebasco Services Incorporated, to take over the servicing of the operating companies, but servicing of the holding companies was discontinued.[4]

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[1] These exceptions involve cases of relatively inactive subholding companies, and local subsidiaries of holding-operating defendants.

[2] R. II, 331-341.

[3] R. II, 325, 328, 329.

[4] The past service arrangements of Bond and Share and the present ones of Ebasco Services Incorporated, are extensively described in the stipulation. For general description, see R. II, 362-366. For detailed description, R. II, 366-427.

American Gas differs in its relationship to Bond and Share, its internal organization, and its relationship to its subsidiaries, from the other holding companies. Consistently from its organization, it has functioned entirely separately from Bond and Share and its associated companies, with distinct officers, staff, personnel and operating organization. Its only relationship to Bond and Share has been the ownership by Bond and Share of approximately 17% of the common stock of American Gas (which represents approximately 25% of the stock voted at meetings) and the presence on the board of American Gas of a common chairman and of one, or in the past sometimes two, additional common members of a board of 15 directors. Bond and Share has in the past aided in selling securities for American Gas and rendered financial service and advice.[1] Differing further from the other holding companies and from Bond and Share, American Gas has at all times throughout its history maintained substantial integration of its organization with all of its subsidiaries. Officers of American Gas have been the chief executive officers of all important subsidiaries, and an extensive service organization has been maintained by American Gas to render centralized technical and administrative services to all subsidiaries on a basis of allocation of cost between the parent company and subsidiaries.[2]

The electric operations of subsidiaries in the Bond and Share system are conducted in 32 states, being confined in many cases to relatively small areas within the states. Some operate only within a single state, some operate in

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[1] R. II, 433-435, 461-467.

[2] R. II, 437-461. Since January 1, 1938, after the decision of the Circuit Court of Appeals herein, services have been rendered on the same basis by American Gas and Electric Service Corporation, a wholly owned subsidiary of American Gas, for American Gas and its subsidiaries.

two or more states, transmitting energy across state lines for their own account, and some sell energy at wholesale in interstate commerce. About 25% of the energy handled is transmitted across state lines, of which only a small percentage is sold in interstate commerce.[1] Of total annual revenues of approximately $232,000,000, some $5,400,000 is realized from wholesale transfers and sales across state lines, that is, sales in interstate commerce.[2] The gas subsidiaries operate in 15 states and, as in the case of the electric subsidiaries, some are purely intrastate and some sell or purchase gas across state lines. Approximately 47% of the gas handled is at some time transported across state lines.[3] What portion of this, if any, is sold in interstate commerce is not disclosed by the record.

Each of the principal defendants has one or more subsidiary companies which are neither holding companies nor utility companies, and which conduct various local businesses.[4] Typical of these are the intervening defendants Spokane United Railways, which operates a street railway and bus system in the City of Spokane, and Spokane Central Heating Company, which operates a central steam heating system in the City of Spokane. Included likewise as an intervening defendant is the Central Arizona Light and Power Company, which conducts purely local public utility operations in the State of Arizona. The purpose of the in-

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[1] See e. g., Exhibit 111, R. VI, 1979.

[2] Findings 31, 32, R. VIII, 2230-2232. For definition, see Public Utility Act, Title II, §201(b). See also pp. 78-79, *infra*.

[3] Findings 42-45, R. VIII, 2235-2236. For detailed description of the operations of the subsidiary utility companies and transmission of electricity or gas across state lines, see R. III, 468-639.

[4] Finding 12, R. VIII, 2222. These companies include such miscellaneous operations as street railway and bus systems, water companies, real estate companies, limestone quarries, sulphur mines, etc. For list of these companies and description of business done, see R. IV, 760-762, 770-781, 792-809, 827-837.

tervention of these defendants, as disclosed by their bill of intervention, is to present directly, if not otherwise involved, the effect of the Act upon such purely local utility and non-utility operations.[1]

(d) The Factual Premises of the Act as Illustrated by Defendants.

Since the Act proceeds upon the express postulate (sec. 1) that the public utility holding company is "an agency which unless regulated is injurious to investors, consumers and the general public" and which may be regulated to the point of destruction, since the courts below have sustained the power of Congress to outlaw the holding company unless it submits to such regulation by the application to it of principles applicable to prostitution, adulterated foods and drugs, diseased live stock, stolen automobiles and lotteries,[2] and since the Government has chosen the original defendants as typical of such companies, it is necessary to consider this basic postulate.

It appears from the record here[3] that in the early days of the electrical industry, the operating companies were, as they still are, local enterprises. Capital available locally was limited, and such companies, being unknown in banking and investment centers, could find only a limited market for their securities. Consequently, in the promotion of local operating companies in order to sell equipment, manufacturers took the securities of such companies in part payment. Sale of these securities to the public, particularly the equity securities, was difficult, if not

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[1] R. I, 206-216.

[2] Opinion, District Court, R. VIII, 2202 *et seq.*; C. C. A., R. VIII, 2322 *et seq.*

[3] R. II, 278-281.

impossible, and the problem of making capital stock of operating companies attractive to the public was peculiarly difficult as to companies operating in small cities.

Bond and Share was organized by General Electric Company in 1905 to solve this problem of disposing of capital stocks of operating utilities by using them as a basis for issuing other securities. The plan of this company came to involve the following characteristics: 50% to 60% of the capitalization of operating companies should be in bonds sold to the public; 20% to 25% should be in preferred stock, sold to the public; and the balance, common stock, should be taken by a holding company which should hold such stock in a group of companies diversified territorially so as to attain any benefit of diversity in climate and industrial factors affecting quantity and continuity of earnings.

Pursuant to this plan, Bond and Share participated in the formation of the principal holding companies which are defendants here.[1] Generally, the process of growth and development of the system may be summarized as follows:[2]

The operating utility companies whose securities were acquired by Bond and Share and associated holding companies are in widely separated areas in which small cities and towns predominate. Of the 3,239 cities and towns having an aggregate population of approximately 11,000,000 served at retail with electricity or gas, 3,139 cities and towns, with an aggregate population of 5,074,000, have less than 10,000 inhabitants.

It was generally characteristic of these utilities, when acquired, that their operations were confined to a single

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[1] For description of organization and corporate relationships of these companies and their subsidiaries, see R. II, 283-351.

[2] R. II, 393-394.

community or a small geographical area. Many of them were in immediate financial difficulties (a substantial number were in receivership), or were confronted with internal dissensions of security holders, or were otherwise unable to keep pace with development in the industry. Frequently, it was at the instance of the security holders of these companies that negotiations were entered into which resulted in their acquisition by Bond and Share or its associated holding companies.

In connection with the acquisition and development of these companies, Bond and Share began early in its history to develop a service organization rendering services to the holding and operating utility companies in the system. Agreements between Bond and Share and the security holders, investment banks and financial institutions involved in financing the companies contemplated that Bond and Share would render such services for compensation.

The services formerly rendered by Bond and Share and now rendered by its subsidiary, Ebasco Services Incorporated, are described at length in the record,[1] and there is a similar detailed description of the services rendered to its subsidiaries by American Gas.[2] The extent and value of these services are apparent from this description, and have never been questioned by anyone. The Federal Trade Commission in its report[3] concedes the value of centralized technical service organizations as one of the major contributions of the holding company to the electric industry.[4]

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[1] R. II, 352-392, 427.

[2] R. II, 443-466.

[3] Report of the Federal Trade Commission to the U. S. Senate, 70th Cong., 1st Sess., Senate Doc. No. 92, pursuant to S. Res. 83 (hereinafter referred to as "F. T. C. Report").

[4] F. T. C. Report, Pt. 72-A, p. 835.

With respect to the particular service organization of Bond and Share, a special report was made which concludes with the following:[1]

> "Summary:—The Electric Bond & Share Co. is an originating and clearing organization, organizing operating public utility companies, gathering them into holding companies, designing equipment, developing policies of administration, stimulating the growth and prosperity of its associated companies, and utilizing the advantages of an apparently successful group of utilities to raise the funds necessary for purchase, improvement, and expansion in large amounts, from widely scattered sources and evidently at advantageous interest and dividend rates. • • •
>
> "This great organization is consistently cooperating by the combined technical knowledge and executive skill of its staff and management to reduce the actual costs of construction and operation, to conduct operations as efficiently and economically as can be done, and expand the business by extensions, enlargements and improvements of service, by rate policies and promotional practices as far as such will produce the profit necessary or desired on the financial structure which has also been devised and built up by the same management."

The general growth of the electric industry during the period of holding company development, which is substantially coincident with the life of Bond and Share, is shown by the Federal Trade Commission report, where it is stated that from 1902 to 1932 the value of plant and equipment of all electric utilities in the United States grew from

[1] F. T. C. Report, Pts. 23 and 24, pp. 418-419.

$500,000,000 to over $12,500,000,000, annual electric output increased from 2,507,000,000 kwh to 75,692,000,000 kwh, and annual revenues from $84,000,000 to $1,854,000,000. The gas industry advanced in somewhat the same proportion.[1] This may be taken as typical of the growth of the companies involved in this case during this period, as the District Court has found that they represent approximately 15% of the electric industry in the United States.[2] As a corollary to this development, service has been rendered by the operating companies at constantly reduced schedules of rates.[3]

With respect to the general character of operations typical of the companies in these systems, the Federal Trade Commission made a special report upon defendant American Gas. A brief reference, sufficient to show the tenor of this report, is given.[4]

> "The properties of the American Gas & Electric Co. system furnish striking examples of high-class steam electric plants, with low costs of output" (p. 702).
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> " • • • This system serves some of the very best industrial and mineral resource areas in the United States. Its facilities have been installed to bring to

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[1] F. T. C. Report, Pt. 72-A, pp. 24, 31-32.

[2] R. VIII, 2231.

[3] In testimony before the House Committee on Interstate Commerce, Mr. Inch, President of Bond and Share, summarized percentage rate reductions of companies in the Bond and Share system from the time of acquisition, showing generally reductions ranging from 25% to 65%, except in the case of one company recently acquired and already having a very low rate, where the reduction was placed at 5%. Hearings on H. R. 5423, 74th Cong., 1st Sess., Pt. 2, pp. 1134-1135.

[4] Page references in the text are to Pt. 72-A of the F. T. C. Report.

these large industries and their related communities a reliable service at prices which would get the business. It also enables the utilities to get the benefits for the power supply system of the diversities consequent upon connection over a wide area of numerous substantial industrial and community loads" (p. 703).

"The famous Philo plant in Ohio and the Twin Branch plant in northern Indiana, close to the Michigan border, are very modern, economically operated, steam electric stations built under the direction of the holding company staff * * *." (pp. 703-704).

"From the standpoints of quality and adequacy of the physical properties and skillful operation, the Commission's examiner has reported these properties to be generally modern and highly efficient. The criticisms which lie against this group are very largely due to the financial actions and policies, which are discussed in other chapters of this report. It may be suggested that those financial policies produced the large sums required for the program of extensive rehabilitation, additions, and betterments which were steps necessary to provide the adequate and large quantity service made available to the areas served, much of that service at relatively low rates." (pp. 705-706).

The criticism referred to of financial policies is directed primarily, if not solely, at the so-called "write-ups", that is, statements of capital values in excess of costs.[1] But, with respect to such criticism, generally, reference may be made to the record here which states:[2]

"American Gas (from 1906 to 1936) has never defaulted or been in arrears in the payment of bond

[1] R. IV, Exhibit 31A, 914-930.
[2] R. IV, 912.

> or debenture interest or cumulative preferred stock dividends, nor has any company, while a controlled subsidiary of American Gas, ever defaulted or been in arrears in the payment of any bond or debenture interest or cumulative preferred stock dividends with one minor exception, a small company in the course of reorganization where the holders of the preferred stock with dividends in arrears subsequently received from American Gas full consideration for their stock. No company in the group now has any amount of interest in default or cumulative preferred stock dividends in arrears."

If there be any more enviable record of financial stability and more cogent evidence of intrinsic soundness of capital structure, it has escaped our observation.

The Trade Commission has said generally as to the character of the structures and service of operating subsidiaries of holding company systems:[1]

> "The maintenance of a satisfactory service in its continuity and evenness of supply has seemingly been a cardinal principle in all systems, operators and most financiers alike realizing that poor service rendered to consumers was the shortest route to the failure of their plans for profit. * * * But in general, the holding company systems appear to have been prompt in revamping or completely rebuilding distribution systems acquired in mediocre condition. * * * High class construction as regards sturdiness has been looked upon as a definite means of keeping down maintenance costs and therefore improving net earnings until near the end of the useful life of the equipment."

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[1] F. T. C. Report, Pt. 72-A, p. 700.

With respect to the holding and operating companies in the Bond and Share system generally, over three score in number, it may be said that from the organization of Bond and Share in 1905 to date, not a single company in that system has defaulted on a short or long term obligation or failed to make any payment of interest or principal on securities created while a member of the system, upon the day that it was due.[1]

Mr. Inch (President of Bond and Share) made the statement before the House Committee.[2]

> "After 30 years of operation, in spite of the recent years of depressed business conditions and notwithstanding increased taxes, subsidized Government competition, and continued political attack, we are able to make the following statement:
>
> "No operating company in our group is in default of interest, sinking fund, or bond maturity, as to any obligation created while a member of our group.
>
> "All but six, and two of those are mainly intercompany held, are earning and paying preferred dividends on stocks held by the public, most of them in full.
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> "No operating company has any borrowings, other than funded debt, payable to anyone except its own holding company.
>
> "No company is in default on taxes.

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[1] In three relatively unimportant cases, reorganizations under Section 77B of the Bankruptcy Act were resorted to during the depression to extend the maturity of existing bonds (Ex. 31, R. IV, 904-913).

[2] Hearings on H. R. 5423, 74th Cong. 1st Sess., Pt. 2, p. 1160; see also as to financial records of different companies, R. IV, Ex. 31, 904-911.

> "Every company is meeting all service demands, maintaining first-class service and progressively reducing rates.
>
> "Only two companies in our group, both holding companies, owe money to any bank. * * *"

The balance sheet of Bond and Share, and the consolidated balance sheets of the principal holding companies and their subsidiaries, as of December 31, 1935, are given in the record. They show a total of cash and cash items aggregating approximately $158,000,000, and, except in the Electric Company system, a ratio of current assets to current liabilities ranging from approximately two and one-half to as much as nine to one.[1]

Concluding this summary, reference may be made to the foot-note in Judge Manton's opinion,[2] in which he says:

> "See also Federal Trade Commission reports for proof that interests of investors, consumers and general public have been promoted by Bond and Share, American Gas and other defendants: F. T. C. Reports, Pt. 22, p. 636; Pts. 23 and 24, pp. 418, 419; Pt. 72-A, pp. 700-706, 832-840, 881; Pt. 84-A, p. 570."

Against this record of constructive achievement, financial solvency, and promotion of public interest, it has been contended, as it doubtless will be here, that these defendant companies have written up their assets on the basis of claimed value, instead of carrying them at original cost; that Bond and Share has in the past made large profits from

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[1] R. IV, Bond and Share, 755; American Gas, 767 American Company, 786; Electric Company, 813; United Company, 822; National Company, 841. The Electric Company system's current liabilities exceed its current assets because of unfunded obligations of United Gas Corporation.

[2] R. VIII, 2318.

its service fees; and that it has acquired control of the associated holding companies, and through them of operating public utility subsidiaries, for a relatively small investment in proportion to their total capital.

Reference to the Trade Commission reports may be made to show that in a number of instances other holding companies, not here involved, have paid grossly excessive prices for properties purchased and capitalized them extravagantly; that others have indulged in various forms of financial manipulations; that some have failed and gone into receivership with great and permanent loss to investors; and that others have been guilty of divers misdeeds.

Admitting these facts to be true, and that federal regulation of such practices may be appropriate if they are shown to affect interstate commerce directly, the record, as made by these defendants and by the holding company industry generally, is conclusive refutation of any charge that the holding company *per se* is an agency injurious to the public and, on the reasoning of the courts below, that it may be outlawed from the field of interstate commerce, and excluded from the use of the mails, under rules of decision applicable to inherently evil practices.

(e) The Holding Company and Interstate Commerce.

In its essential nature, a holding company is merely a company which owns the stocks and, perhaps, other securities, of other companies. By definition under the Act (sec. 2(a)(7)), it is a company which "controls" an electric or gas public utility. A 10% voting stock ownership is *prima facie* control but a lesser interest may be affirma-

tively found by the Commission to constitute control, and a greater interest not to involve control.

Of the principal defendants involved here, American Company, Electric Company and National Company, and their sub-holding companies,[1] are simply investment holding companies (p. 11, *supra*). Their business as such is not interstate commerce. They do not participate, in their corporate capacity or through their directors or officers, in either the interstate or intrastate activities of their subsidiaries. Their control is exercised only through stock vote (p. 11, *supra*). They may from time to time engage in transactions in interstate commerce or may use the instrumentalities of interstate commerce in particular transactions, such as the distribution of securities, in such manner that those particular activities become the subject of federal regulation.

In addition to companies of a pure holding company type, such as those mentioned, there are involved, as defendants here, two other classes of holding companies engaged in activities in addition to those of owning, voting and receiving income from securities.

Bond and Share, through Ebasco Services Incorporated, and American Gas perform services for subsidiary operating companies, as previously mentioned.[2] It may be conceded, as found by the District Court, that the carrying out of these service contracts involves continuous and extensive use of the mails and instrumentalities of inter-

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[1] The only important subsidiary holding company now left in the system (other than holding-operating companies) is Lehigh Power Securities Corporation, which controls Pennsylvania Power & Light Company. R. II, 297.

[2] Pp. 11-12, *supra*.

state commerce,[1] although we agree with that court that "this is not to say that the entire business of Ebasco or American Gas constitutes interstate commerce and is therefore subject to unlimited federal regulation. The mere use of an instrumentality of interstate commerce does not necessarily subject the entire business of the user to federal regulation under the commerce clause".[2] *A fortiori,* it cannot subject the business of associated companies, doing no interstate commerce, to such regulation.

The "holding-operating defendants" (p. 9, *supra*) are primarily operating public utilities, but are holding companies by reason of their ownership of the stock of subsidiary public utilities incorporated separately for some purpose of local convenience.[3]

In considering the basic theories of the Act, it may be remarked that it is not the interstate transmission of electricity or gas in which these companies themselves engage which is the basis or the object of their federal regulation under the Act, but their relations to their subsidiaries, interstate or intrastate. Thus, Appalachian Electric Power Company, a subsidiary of American Gas, is an *exempt* holding company, although it transmits large quantities of electric energy across state lines, solely because it and its subsidiaries are all incorporated in the same state and operate in that and contiguous states. On the other hand, Utah Power & Light Company, a Maine corporation, which transfers electric energy from Idaho to Utah, is subject to regulation as a holding company, not because of its inter-

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[1] Findings of Fact Nos. 50-60; R. VIII, 2237-2247.

[2] Opinion, R. VIII, 2205.

[3] For a description of these particular companies and their relationship to their subsidiaries, see R. II, 344-348, and for a description of all holding-operating defendants, see *id.*, 343-351.

state transmission, but because of its ownership of stocks of The Western Colorado Power Company, Utah Light and Traction Company and Bountiful Light and Power Company, intrastate utilities operating solely within the borders of Colorado and Utah, respectively, in which states they are incorporated.[1]

(f) The Subsidiary Operating Company and Interstate Commerce.

The electric and gas public utility businesses are primarily and essentially local in character. Their operations are predominantly intrastate—in contradistinction to such businesses as railroads, telegraph and telephone companies and other agencies of interstate commerce. The interstate transmission of electricity or gas, where it occurs, is incidental rather than essential to their main function, which is the local distribution of electricty or gas to consumers by means of fixed assets in place, constructed and operated for that particular purpose and available for no other use.

At the opening of the hearings before the House Committee on Interstate and Foreign Commerce on the bill, which subsequently became the Act, Dr. Splawn, now of the Interstate Commerce Commission, and then "Special Counsel" to the House Committee and the author of its report, stated:[2]

> "The power business is not like the telephone business or the railroad business, transcontinental or essentially an interstate proposition. Its operations are at the most regional. Many of the sound-

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[1] R. III, 580-583, 523-529. See section 3 of the Act, p. 31, *infra*, for the criteria of differentiation.

[2] Hearings on H. R. 5423, 74th Cong., 1st Sess., Pt. I, pp. 180-181.

> est operations are altogether intrastate and may be designated as local. * * *
>
> "These interregional holding companies have undertaken to tie a number of local or regional activities and operations into one top control. That is to say, this is an industry which is essentially local and which should be regulated, should be managed, locally, and therefore regulated locally. That is, by the municipalities and by the States. * * *
>
> "I believe that the regulation of the rates and the issuance of securities and policing of the accounts and fixing of valuations of these properties should be by the States and by the municipalities, because their activities are local."

This characteristic of the business is recognized by the stipulation in this case[1] and is illustrated by the operations of the subsidiaries of the defendants here, as previously pointed out.[2]

A graphic picture of the operations of different subsidiary companies, showing that in general operations are confined within state lines or regional localities, is shown by the map constituting Exhibit 112A.[3] As illustrative, further reference may be made to the chart of the corporate structure of American Company contained in Exhibit 9,[4] from which it appears that of the twenty-one gas and electric utilities listed, thirteen confine their utility operations within single states. Two of these, in addition to their local utility operations, sell some electricity at the state line to a subsidiary or associate company operating in the adjoining state.

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[1] Electric business, R. III, 468-488; gas business, *id.*, 611-619.
[2] Pp. 12-13, *supra*.
[3] R. VII, 2116.
[4] R. VII, 2088.

Similarly, the "holding company systems" of all of the principal holding company defendants here include equally important subsidiaries which do no public utility business in interstate commerce, as well as companies which are engaged in such commerce as separable parts of their operations. Of some thirty-three relatively important electric utility companies subsidiary to the four major holding companies in the Bond and Share system, fifteen have no interstate contacts at all and transact their entire business within a single state without either exporting or importing electricity.[1] The only interstate activity of most of the other operating companies is the transmission for their own account of some gas or electricity from a place of production in one state to a place of distribution in another. Such transmission for their own account and over their own facilities involves no commercial transaction whatever. "There is no known case of the use of a transmission line as a common carrier."[2] The failure of the Act to distinguish in any wise between these companies and their activities in the extent and scope of its application is one of the major criticisms directed to it.

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[1] Central Arizona Light and Power Company, Florida Power & Light Company, New Mexico Electric Service Company, Texas Electric Service Company, Texas Power & Light Company, Texas Public Utilities Corporation, New Orleans Public Service Inc., Dallas Power & Light Company, The Western Colorado Power Company, Birmingham Electric Company, Houston Lighting & Power Company, West Tennessee Power & Light Company, The Scranton Electric Company, Indiana General Service Company and Atlantic City Electric Company. R. III, 490-610.

[2] R. III, 474. For a brief but comprehensive discussion of the significance of interstate transmission in the electric industry see R. III, 468-488, particularly, 476-479 and 483-486.

(g) Summary of the Act.

Section 1 of the Act, entitled "Necessity for Control of Holding Companies", recites that public utility holding companies and their subsidiaries are affected with a national public interest; that that interest, and the interest of investors in their securities, and of consumers of electric energy and gas, "are or may be adversely affected" by certain abuses in the management and control of such companies, disclosed by the reports of the Federal Trade Commission and other documents; and that when such abuses become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers and the general public. It is then declared to be the policy of the Act, in accordance with which all of its provisions shall be interpreted, to meet the problems and eliminate the evils enumerated, and "for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided" (1(c)).

The evils enumerated relate to (1) the issue and sale of securities, (2) charges to subsidiaries for services, equipment and materials and the allocation of such charges among subsidiaries, (3) accounting practices, rate, dividend and other policies, (4) the growth and extension of holding companies without relation to operating economies, or the integration of related operating properties, and (5) lack of operating or capital economies, of efficiency and adequacy of service, and of effective public regulation (1(b)).

Although section 1 states that the purpose of the Act is to eliminate the above-mentioned abuses which are "connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce", such abuses do not *per se* affect interstate commerce, and the jurisdictional definitions extend the application of the Act to companies not engaged in, and to transactions which do not involve or affect, interstate commerce or the use of the mails.

The definition (2(a)(7)) which subjects the holding company defendants to the Act is:

> "(7) 'Holding company' means—
>
> (A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company * * *, unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; * * *"

"Public-utility company" means an electric or a gas utility company (2(a) (5)). "Subsidiary company" is defined to include all subsidiaries, whether utility companies or not (2(a) (8)). These terms, even when limited by the Commission as authorized by 2(a) (3) and (4), include, without distinction, companies which confine their operations within a single state as well as those which may engage in interstate activities. Authority to declare a holding company not to be a holding company is expressly limited (2(a) (7)) to such companies as do not control their public utility subsidiaries or exercise such a controlling influence over their management or policies as to make it "necessary

or appropriate in the public interest or for the protection of investors or consumers" that the holding company be subject to the Act (2(a) (7)). Absence of control, not the absence of interstate commerce, is the test.

By section 3, exemption of a holding company may be granted, if the holding company and every public utility subsidiary from which it derives any material part of its income, carry on their business substantially in a single state "in which such holding company and every such subsidiary company thereof are *organized*", or if the holding company is predominantly a public utility whose operations do not extend beyond the state in which it is *organized* and contiguous states. The public interest, the interest of investors and consumers, interstate contiguity and corporate domicile, and not the absence of interstate business, control the right of a holding company to exemption.[1] With respect to subsidiary companies, section 3 gives the Commission power to exempt conditionally or unconditionally any class or classes of persons from the obligations of subsidiaries, if it deems such exemption necessary or appropriate in the interest of the public or for the protection of investors or consumers. The plenary discretion given to the Commission in this respect is uncontrolled by any more definite rule or standard.

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[1] This is graphically illustrated by the record here. Defendant, The Washington Water Power Company, is an exempt holding company (R. VIII, 2219), although it does business in Washington and Idaho and extensively across state lines, while its associate company, Pacific Power & Light Company, which transacts exactly the same kind of business in Oregon and Washington and across state lines, is a subject holding company (R. VIII, 2219). The sole factual distinction is that The Washington Water Power Company and all its subsidiaries are incorporated in Washington, while the companies in the Pacific Power & Light Company system are organized in different states. See R. III, 491-493. See also pp. 25-26, *supra*, contrasting the Appalachian and Utah companies.

Holding companies, thus defined, and not exempted by the Commission, are excluded from interstate commerce and from certain uses of the mails and facilities of interstate commerce by section 4(a) unless they register under 5(a) and thereby become subject to control of the Commission as provided in subsequent sections. Registration under 5(a) is effected by filing a "notification of registration", which consists of little more than the name, post office address, tabulated outline statement of financial structure, and names of officers and directors.[1] It is not a regulation of interstate commerce or of the mails, nor is it claimed to be by the plaintiff or either court below.

The control system which is set forth in sections 5(b) to 13, inclusive, is in no way limited to transactions constituting or affecting interstate commerce. Furthermore, these sections transfer to the Commission not merely regulatory power, but unlimited discretionary control which extends from the top holding company to the most insignificant subsidiary, whether utility or non-utility, interstate or intrastate, and to activities whether accomplished by use of the mails or any means or instrumentality of interstate commerce, or otherwise, and without findings that such activities obstruct or affect interstate commerce.

Section 5(b) requires the filing of a "registration statement" the contents of which are entrusted to the unlimited discretion of the Commission except as controlled by its view of the public interest and the protection of investors and consumers. The indicated contents are corporate and financial data, not data related to any business in or affecting interstate commerce.

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[1] General Form VI, Exhibit 7, R. IV, 652-654.

Sections 6 to 10, inclusive, transfer to the Commission (subject to limited and unimportant exceptions) absolute control over the registered company and all its subsidiaries with respect to the creation of new capital liabilities (the issue of securities), the sale of securities of any company in the system, and the acquisition of capital assets—"any securities or utility assets or any other interest in any business". This control is expressly made so broad that the Commission may determine the type of securities which may be issued, sale prices, fees, commissions, and terms of issue, and the price to be paid for securities or assets, including fees and commissions, and the reasonableness of such price in relation to sums invested or earning capacity. It should be noted that the control over the issuance and sale of securities is not limited to securities sold in interstate commerce, or which may be the subject of an interstate sale, or which may be a lien on assets used in the transaction of interstate business—it extends to the creation of the security, regardless of its nature, or the business of the issuer, or the means of its sale or disposal. Acquisitions are controlled in like manner, irrespective of whether the acquisition is by interstate sale, and, in the case of the acquisition of assets, irrespective of whether the assets are to be used for interstate business or for purely intrastate purposes. And, in the exercise of these broad powers, the only guide to the Commission's discretion or standard for its judgment is the "public interest", and the protection of "investors or consumers", except that negatively it may not approve any acquisition of property or securities which will not contribute to the creation of an "integrated public-utility system".[1]

[1] Section 10 (c). "Integrated public-utility system" is defined by section 2(a)(29).

Section 12 contains various prohibitions against intercompany loans, redemption of securities, payment of dividends, sales of securities or assets, solicitation of proxies, and other matters, all of which are either absolute or conditioned upon compliance with rules, regulations or orders of the Commission.

By section 13 the performance of service, sales or construction contracts by registered holding companies is prohibited, and rendition of such services by subsidiaries of a registered holding company is subject to regulations prescribed by the Commission. Such services may only be rendered in accordance with such terms and conditions and subject to such limitations and prohibitions as the Commission may prescribe, and must be rendered to domestic utilities at cost. The prohibitions and regulations apply to all services rendered regardless of their nature or whether the business serviced is intrastate or interstate.

By section 11—the widely-advertised death sentence—registered holding companies are required to be reorganized under orders of the Commission made after a hearing. By this section it is made illegal for a holding company (with minor exceptions, and then only with the revocable permission of the Commission) to continue to own controlling stock interests in utilities in more than a single integrated electric or gas system, or to own such stock interests in both electric and gas utilities, or to own such interests in both foreign and domestic utilities or to continue in existence and be more than a "second degree" holding company. Since it is unlawful under the preceding sections for any such holding company or any of its subsidiaries to dispose of any of its holdings in an effort to comply with the Act, except under conditions which per-

mit the Commission to dictate which of its holdings it may retain and which it must dispose of, for what price, and to whom, the Commission is clothed with such unexampled power that it can, in effect—to quote one of the authors of the Act[1]—reconstruct the public utility map of the United States.

Conformity to the regulatory system thus prescribed, except to orders under section 11 to enforce which court proceedings are necessary, is obtained by authorizations to the Commission to require reports, to hold investigations and hearings, to make rules, regulations and orders (18-20) with provisions for judicial review (24), by making void all contracts made in violation of any provision of the Act or rule, regulation or order of the Commission (26), and by fines of up to $10,000 or imprisonment for not more than two years, or both, for each offense (29).

The scope of the Act is more extensive than any regulations predicated upon the postal or commerce powers of Congress which have stood the test of litigation. Its application to companies and transactions within its terms would bring about a regulation and control of local business in the field to which it relates comparable in its effect to that which the National Industrial Recovery Act (48 Stat. 195; 15 U. S. C. A. §701) sought to impose upon conditions of local trade and that which the Agricultural Adjustment Act (48 Stat. 31; 7 U. S. C. A. §601) sought to impose upon the production of agricultural products. See *Burco, Inc.* v. *Whitworth.*[2]

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[1] Hearings before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess. p. 202.

[2] 81 F. (2d) 721, 737-738 (C. C. A. 4th, 1936).

(h) The Registration Device—Sections 4 and 5(a).

The mechanical device employed to subject holding companies to this plenary system of federal control is set forth in section 4, which prohibits them, unless they register, from transmitting gas or electricity in interstate commerce, from owning or operating utility assets for such transmission, from using the mails and the instrumentalities of interstate commerce in the normal conduct of lawful business transactions essential in the management of their property and affairs, from engaging in any business in interstate commerce, and from owning, controlling or holding with power to vote, any security of any subsidiary company which engages in any similar business (4(a)). Furthermore, if they have outstanding any securities which were distributed by the use of the mails or instrumentalities of interstate commerce subsequent to January 1, 1925, any of which were owned on October 1, 1935 by non-residents of the state where the company was organized, they are required to register (4(b)).[1] These provisions are enforceable by fines not exceeding $200,000 against the offending holding company, and fines not exceeding $10,000 or imprisonment not exceeding two years, or both, against other persons (29).

The prohibitions of section 4(a) are in terms limited to unregistered holding companies, but it is quite impossible for holding companies to continue in business, unregistered, in the face of these prohibitions. Nor can they

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[1] The plaintiff and the court below apparently abandoned section 4(b) as a total loss, but it is evidentiary of the Congressional intent to compel registration by all holding companies regardless of their transaction of any business within the federal power to regulate.

cease to be holding companies, because while they may not own the securities through which they control their subsidiaries, they may not dispose of them by public sale through the usual channels. Thus their only escape from mortal paralysis is to register.

If they do so, the plenary control above outlined instantly becomes applicable to them and to all of their subsidiaries, regardless of the nature of their business or its relationship *vel non* to interstate commerce. This system of controls is unrelated to the transactions prohibited in section 4(a), which ceases to have any vitality as soon as the simple notice of registration is filed under 5(a).

The registered holding company and its subsidiaries cannot escape this control by refraining from participation in transactions specified in section 4(a), but can escape only by the holding company's ceasing to be a holding company, upon such terms and conditions as the Commission finds necessary for the protection of investors (5(d)). Thus 4(a) is not merely a penalty for failure to register; it is the trigger by means of which a trap is sprung from which there can be no escape except by the death of the holding company or its transmigration, with the consent of the Commission, into other business fields.[1]

The act of registration is fully accomplished when the Commission receives a "notification of registration", re-

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[1] As the plaintiff stated in the District Court: "*Registration under this Act is not a matter of free choice or election. All companies whose business requires them to do the acts or things specified in section 4(a) are obliged to register if they continue in business* * * *." (Brief on Scope of Issues, p. 16.)

It should be noted that the Commission has stated in all of its findings and orders granting applications for exemptions as holding companies that the applicant will be exempt "from all provisions of the Act *which would require its registration thereunder* * * *". See, *e. g.*, Releases Nos. 132, 260, 324, 326 and 328.

quired under section 5(a). The "registration statement" (5(b)) required to be filed at some later time within one year after the date of registration to be fixed by the Commission (5(c)) is not part of the act of registration and is unrelated to the transactions prohibited to non-registered companies under 4(a).[1]

(i) The Decision of the District Court.

The decree of the District Court in form enjoined the holding company defendants other than those which have been exempted (p. 10, *supra*) from performing the activities specified in section 4(a) of the Act,[2] and dismissed the cross-bill of all the defendants.

The injunction restrains them unless they register or cease to be holding companies:

> 1. From selling or transmitting electric energy or gas in interstate commerce or owning or operating facilities for such interstate transmission.
>
> 2. From using the mails or instrumentalities of interstate commerce to
>
> (a) perform service, sales or construction contracts for any public utility or holding company;
>
> (b) distribute or make any public offering for sale of their own securities or those of any public utility or holding company;

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[1] This suit was commenced in November, 1935. The stipulation of facts was submitted in July, 1936, and it was not until October, 1936, that the Commission determined the content and form of such statements. Form U5B, adopted October 2, 1936.

[2] Except as specified in subsection (5)—engaging "in any business in interstate commerce"—which the court found it unnecessary to consider, as the defendants were not shown to be engaged in any such business, other than the activities specified in the other paragraphs. Opinion, R. VIII, 2207.

(c) acquire or negotiate for the acquisition of any utility assets or securities of any holding company or public utility company.

3. From owning, controlling or holding with power to vote any securities of any subsidiary that does any of the things specified in 1 and 2.

In reaching its conclusion, the District Court held that sections 4(a) and 5 are separable from the remaining provisions of the Act, and standing alone constitute a workable and valid law to which effect can be given even if the remaining provisions are unconstitutional. Although the court stated that enforcing 4(a) was tantamount to requiring registration,[1] it held that none of the defendants had any standing to contest by counterclaim the validity of the provisions applicable only to registered holding companies and their subsidiaries.

The District Court continually referred to sections 4(a) and 5 as "the registration provisions".[2] It failed to note that the use of the mails and facilities of interstate commerce in the transactions enumerated in 4(a) was not conditioned upon the filing of a registration statement under 5(b), but merely upon the filing of the simple notice of registration required by 5(a). This is clear from the court's statement of the question involved at R. VIII, 2191:

> "The question is as to the power of Congress to forbid public utility holding companies to do the acts enumerated in sec. 4(a) unless they *first* register *and* file the information required of registered companies by sec. 5."[3]

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[1] R. VIII, 2189, 2211.

[2] R. VIII, 2178, 2179, 2183, 2191.

[3] Unless otherwise noted, italics appearing in quotations in this brief are supplied by us.

The Act does require registration before the acts forbidden may be done. It does not condition its prohibitions upon failure to file information required after registration.

This misconception of the express provisions of sections 4(a) and 5 led to the erroneous conclusion that the filing of the registration statement required under 5(b) was a part of the process of registration, and registration could be sustained as a separable form of publicity regulation.

The same basic fallacy is inherent in the discussion of the constitutionality of sections 4(a) and 5. Considering 4(a) as a regulation rather than as a penalty for failure to register, Judge Mack's argument proceeded upon the principle, which no one disputes, that some of the acts enumerated in 4(a) are within the regulatory power of Congress. He did not consider the real constitutional issue raised by these sections standing alone, viz: whether 5(b) is a valid regulation of the acts prohibited by 4(a) or, indeed, of any interstate commerce performed by registered holding companies or their subsidiaries.

In dismissing the cross-bill and counterclaim, although agreeing that the decree in effect compels the defendants to register, the District Court held that they were not entitled to relief against the enforcement of the Act, assuming it to be invalid, until they actually become registered companies. In this connection the court said (R. VIII, 2211):

> "Since the defendants intend to secure a review of these proceedings, it is clear that they will not register unless and until they are required so to do by decision of the Supreme Court. Therefore, the regulations pertaining to registered holding companies will not affect them for at least some time."

Thus the District Court refused to consider whether the defendants could lawfully be subjected to the immediate consequences of compliance with the decree solely because an appeal was contemplated. This was more than erroneous. It was a fundamental abuse of judicial process, which, if allowed to prevail, would reserve for decision in the court of final resort questions not considered in the court of first instance.

(j) Decision of the Circuit Court of Appeals.

The three members of the Circuit Court of Appeals were unanimous in affirming the decree of the District Court.[1] However, they did not unite in an opinion stating the grounds of their action.

Judge Manton filed an opinion that followed closely the opinion of the District Court in its treatment of the problem, proceeding likewise on the theory that the activities specified by section 4(a), being activities in interstate commerce or activities carried out through the channels of interstate commerce or the mails, were subject to regulation, that the informatory provisions of 5(b) were therefore valid, and that these sections were separable from the control provisions of the Act.

Judge Learned Hand filed a concurring memorandum expressing doubt whether sections 4 and 5 may stand alone, but holding that parts of 6 and 7, relating to the issuance and sale of securities, and of 9 and 10, relating to their acquisition, are valid (although suggesting that other parts are probably invalid) and constitute "a workable system of controls • • • which Sec. 5 would implement". Thus, he apparently agreed with defendants' position as

[1] R. VIII, 2333.

to the structural relationship of the parts of the Act, and believed it necessary to sustain sufficient of the substantive regulatory system to support the registration requirement enforced by the decree.

Judge Swan merely concurred in the result without assigning any reason.

We shall hereafter point out the conflict between the decision here and that of the Circuit Court of Appeals for the Fourth Circuit in *Burco, Inc.* v. *Whitworth, supra,* in which the unanimous court of three circuit judges affirmed the decision of the District Court holding the Act as a whole (including the registration requirements) invalid as to a holding company clearly within its terms.

It would appear, therefore, that five of the eight judges (four in each circuit) who have passed on the Act are in agreement that sections 4(a) and 5 are not separable from the regulatory controls of the Act; that two only have held that they are separable, and the opinion of the eighth is undisclosed. The four judges (in the Fourth Circuit) who have passed on the substance of the Act have held it invalid on the specific case before it.

Specification of Errors.

Defendants severally present for consideration upon this review the following questions included within the assignments of error:

1. The Circuit Court of Appeals erred in affirming the holding of the District Court that sections 4(a) and 5 of the Act constitute a constitutional, valid and reasonable

regulation of interstate commerce and the mails (Assignment of Errors, 1 to 23; R. VIII, 2271-2278).

2. The Circuit Court of Appeals erred in affirming the holding of the District Court that sections 4(a) and 5 of the Act are separable from the remaining provisions thereof and that the various provisions of said sections are separable from each other (Assignment of Errors, 24 to 33; R. VIII, 2278-2282).

3. The Circuit Court of Appeals erred in affirming the District Court in so far as the District Court failed to hold that the substantive regulatory system prescribed by the Act subsequent to the registration provisions is unconstitutional (Assignment of Errors, 34 and 35; R. VIII, 2282-2284).

4. The Circuit Court of Appeals erred in affirming the decision of the District Court dismissing the counterclaim and cross-bill (Assignment of Errors, 36 to 51; R. VIII, 2284-2291).

5. The Circuit Court of Appeals erred in affirming the District Court in so far as the District Court refused to determine the rights, liabilities and duties under the Act of the operating company defendants, subsidiaries of the holding company defendants (Assignment of Errors, 52 to 68; R. VIII, 2291-2296).

6. The Circuit Court of Appeals erred in affirming the decision of the District Court in granting an injunction decree (Assignment of Errors, 69 and 70; R. VIII, 2297).

Summary of Argument.

The Act is wholly invalid because of its scope and all-inclusive provisions. It inseparably commingles intrastate and interstate companies and activities by common definitions and provisions and cannot be confined by judicial limitation to companies or activities within the power of Congress.

It must be regarded as a whole and read in its entirety to determine the separability of any section or sections. Particular sections cannot be isolated and considered in a vacuum without regard to their setting and context and their functional relationship to the Act as a whole.

Thus reading sections 4(a) and 5 (separated by the decision of the courts below from the regulatory or control provisions of the Act) it is clear that they are not a substantive regulation by themselves but are purely auxiliary to such regulatory or control provisions, specifically sections 6 to 13.

Their inseparability is demonstrated by the declared scope and purpose of the Act (sec. 1) which makes manifest that it was the intention of Congress by its enactment to control public utility holding companies, even to the point of their destruction.

In this light, sections 6 to 13 (the control sections) are the bone and sinew of the Act. They are the sections which Congress relied upon to accomplish its declared purpose of "eliminating" the evils in public utility holding company systems.

Sections 4(a) and 5, re-inforced by the heavy penalties of 29, merely implement this system of controls. 4(a)

coerces holding companies to register and thereby to submit to such controls. 5(a) provides the mechanics for registration, and 5(b) provides for furnishing the basic information concerning the companies upon which the controls specified by 6 to 13 are to operate.

Sections 4(a) and 5 do not constitute a separable system of regulation by publicity. Not only was no such independent function intended but, as demonstrated by their relationship to the Act, they cannot perform any such function. The contents of the registration statement prescribed by section 5(b) do not relate to, and thus cannot regulate, the activities described by 4(a), but do relate to, and furnish the basic information for, the application of the control system. The contents of the registration statement may not be disclosed except in the discretion of the Commission (22). Consequently, regulation by publicity is not its function.

If sections 4(a) and 5 be regarded as a separable statutory enactment, they are not a constitutional, valid and reasonable regulation of interstate commerce and the mails. Section 5(a) is not a regulation of commerce or the mails, nor is it claimed to be. As previously shown, 5(b) relied upon alone to support the penalties of 4(a) is not regulatory of the transactions thereby prohibited nor of any business in interstate commerce.

Considered alone, section 5(b) is a naked grant of inquisitorial or visitatorial power and is invalid because not an exercise of any constitutional power. Unless the Commission has some function to perform with respect to the information furnished, it becomes an unlawful delegation of legislative power to the Commission since the form and content are to be prescribed entirely by rules and regula-

tions of the Commission in its concept of the public interest and the interest of investors and consumers.

Section 5(b) cannot be supported by 4(a), which, being merely a penalty, cannot validate regulations with which it coerces compliance.

Assuming power to exclude holding companies from interstate business and normal use of the mails and instrumentalities of interstate commerce, such power cannot be used to coerce compliance with unconstitutional regulation. Standing by itself as a naked penalty, section 4(a) contravenes the Fifth, Sixth and Eighth Amendments to the Constitution.

If, therefore, the decree cannot be supported on the foundation of sections 4(a) and 5 standing alone, it is necessary to find such support in the substantive regulatory system of the Act, *i. e.*, the controls of sections 6 to 13.

These sections do not regulate interstate commerce or the use of the mails. The companies which comprise the electric and gas utility industry are not, as such, instrumentalities or agents of interstate commerce, nor is their business, as such, interstate commerce. Some of the companies do engage in particular business or transactions which constitute interstate commerce and which may be regulated, but other companies do no such business. This Act predicates the regulation of all alike merely on the holding company relationship and not upon engagement in any business or activities which constitute or affect interstate commerce.

Nor are the control sections predicated upon or confined to the regulation of activities constituting or directly affecting interstate commerce or the use of the mails. They relate to the issue and sale of securities (secs. 6-7); to the

acquisition of assets or securities (secs. 8-10); to sundry corporate and financial transactions (sec. 12); to the reorganization or dissolution of holding company systems (sec. 11); and to the performance of service, sales and construction contracts (sec. 13). In none of these sections is interstate commerce or the use of the mails a condition of the regulation of a particular transaction nor need the company whose transactions are so regulated be engaged in interstate commerce or activities directly affecting such commerce.

Conversely, the Act invades the reserved powers of the states, in violation of the Tenth Amendment, in its interference with purely intrastate transactions, and in its control of purely intrastate corporations in the exercise of charter powers given them by the states of their incorporation.

The absence of any standard for the Commission's action in the various matters entrusted to its control, except its untrammelled conception of the public interest and the interest of investors and consumers, makes the Act an unconstitutional delegation of legislative powers to the Commission, in violation of Article I, Section 1 of the Constitution.

The Act is lacking in due process and offends against the Fifth Amendment. Fundamentally, its essential concept is not regulation by prescribed standards of law, but the transfer of control of corporations from their directors and stockholders to the Commission in terms so broad that management is transferred from the owners of the property to the public. This power extends to the control of their essential activities, as hereinbefore mentioned, and even to the disposal of the property and assets and the reorganization of the companies themselves.

If the decree of the court below is correct in requiring defendants to register on the theory of the separability of sections 4(a) and 5, unsupported by the control provisions, the defendants, being under a duty to register, and being threatened with irreparable injury by the controls of the Act, have a right to relief under their cross-bill either by way of injunction or declaratory judgment, against those control sections which become applicable to them immediately upon registration.

If the holding companies themselves have not the right to question these controls by their cross-bill, the intervening subsidiary defendants immediately affected in all respects equally with their parent holding companies by the registration of the latter have the right by their intervention and cross-bills to obtain an adjudication as to whether or not the controls of the Act to which they are thereby subjected are constitutional as to them.

It is submitted that the decree of the District Court, affirmed by the Circuit Court of Appeals, was erroneous both in its injunctive provisions and in dismissing the cross-bill, that the Circuit Court of Appeals erred in affirming such decree, and that the order of the Circuit Court of Appeals and decree of the District Court should be reversed.

Argument.

The decisions of the courts below are in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Burco, Inc.* v. *Whitworth, supra,* where the Act was held invalid as to a holding company clearly within its terms and definitions. If that opinion is followed here, the Act must similarly be held void as to these defendants.

We challenge the Act in its entirety as an attempt to control normal business transactions, investments and corporate relationships in an industry primarily local in character and without regard to the regulation of commerce or any other matter within the constitutional sphere of federal control. Its objectives are not the regulation of commerce, but the public interest and the protection of investors and consumers. The control provisions not only transcend the limited powers of Congress, but, ignoring the requirements of due process, transfer the responsibility of corporate management to federal commissioners.

The decree now before this Court for review converts the Act into a species of trick legislation by which, if its substantive controls are beyond the powers of Congress, submission is nevertheless coerced by sustaining provisions inserted for the single purpose of coercing such submission.

If the Act should be sustained, there has been discovered the formula for control of all business by the federal government: the prohibition of transactions in interstate commerce, and of the right to use the mails and facilities of commerce, unless such business submits to a control system which is beyond the power of Congress. This device could be extended to all kinds of business and all manner of transactions.

I.

The Act is wholly invalid because of its scope and all-inclusive provisions.

The Act as a whole and in each of its parts inseparably commingles intrastate and interstate companies and activities by common definitions and provisions and cannot be confined by judicial limitation to companies or activities within the powers of Congress. Therefore, it is wholly void.

The leading case is *United States* v. *Reese*,[1] decided in 1875, wherein the Court, speaking through Chief Justice Waite, holding the Civil Rights Act invalid because its inclusive language went beyond the scope of the Thirteenth Amendment, said:

> "* * * We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether."

[1] 92 U. S. 214 (1875).

This decision has been consistently followed ever since.[1] All inclusive provisions of a statute must be valid as to all they embrace, or altogether void. Even if the courts could delete or limit the language of the Act in order to render it valid, its criminal provisions, including section 4(a), punitively sanctioned by 29, would be void for uncertainty under the doctrine of *Smith* v. *Cahoon*.[2]

In *Hill* v. *Wallace*[3] the Future Trading Act was held invalid in its entirety because it applied to all sales for future delivery on boards of trade without limitation to those which might be regarded as directly interfering with interstate commerce. The Court said:[4]

> "There is not a word in the Act from which it can be gathered that it is confined in its operation to interstate commerce. The words 'interstate commerce' are not to be found in any part of the act from the title to the closing section. * * * Looked at in this aspect and without any limitation of the application of the tax to interstate commerce, or to that which Congress may deem from evidence before it to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. * * *
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> "* * * Section 11 (the separability provision) did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court."

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[1] *United States* v. *Ju Toy*, 198 U. S. 253 (1905); *Trademark Cases*, 100 U. S. 82 (1879); *First Employers' Liability Cases*, 207 U. S. 463 (1908).

[2] 283 U. S. 553 (1931).

[3] 259 U. S. 44 (1922).

[4] *Id.* at 68, 70.

The principle was confirmed as late as the decision rendered by this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation* in April, 1937,[1] wherein, speaking through the Chief Justice, this Court stated:

> "The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted that the references in the Act to interstate and foreign commerce are colorable at best; that the Act is not a true regulation of such commerce or of matters which directly affect it but on the contrary has the fundamental object of placing under the compulsory supervision of the Federal government all industrial labor relations within the nation.
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> • • • • • •
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> "If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the Federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. • • • That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system."

We submit that this Act contains the very defects which this Court there declared would be fatal. It *is* an attempt to regulate all companies in holding company systems, regardless of the business in which they engage or the incidence of such business on interstate commerce, thus invading the reserved powers of the states over their local

[1] 301 U. S. 1 (1937).

concerns. The reference to interstate commerce in the preamble *is* colorable at best and the definitions and substantive regulatory provisions contain no limitation whatsoever to interstate commerce or to activities directly affecting interstate commerce. It *has* the fundamental object of placing under the compulsory supervision of the federal government all aspects of the electric and gas utility business except the rendition of utility service; it *is not* a true regulation of interstate commerce or of matters which directly affect it. This conception of the Act is inherent in its terms.

The preamble (sec. 1(c)) states that its object is to "eliminate the evils" connected with holding companies engaged in interstate commerce, or in activities which directly affect or burden that commerce; not to regulate interstate commerce, or activities affecting such commerce, but to purify the holding companies themselves. It does not purport to say that interstate commerce shall be properly conducted, but only that proper persons conforming to a federal standard of propriety shall conduct such commerce. This clause, the definition of such commerce in 2(a)(28), and the prohibitions of 4(a) are the only references to interstate commerce in the Act, except as throughout it prohibits various activities being conducted by use of the instrumentalities of commerce "or otherwise".

Neither the definitions nor the exemptions governing the companies and transactions to which the Act is to be applied include as an element engaging in interstate commerce or in activities affecting such commerce. They exclude one and include another of precisely identical companies upon the sole criterion of state of organization (p. 31, *supra*). The controls are applied, regardless of

whether or not the companies are engaged in interstate commerce, or activities affecting such commerce. It must be remembered that registration directly affects not only the holding company but all its subsidiaries. The entire system, of which the holding company is the apex, is committed to Commission control. Purely intrastate subsidiaries are committed to exactly the same controls as the subsidiaries which do some interstate business.

In brief, commencing with its jurisdictional postulates and continuing through the definitions which condition its application, the informatory provisions of section 5 and the regulatory processes of 6 to 13, the Act is not conditioned upon or limited by any distinction between the respective spheres of the state and federal governments in the field of commerce.

II.

Sections 4(a) and 5 cannot be separated from the remainder of the Act and enforced as an independent statutory enactment.

(a) *The Act must be regarded as a whole in order to determine the separability of sections 4(a) and 5.*

Plaintiff contends, in substance, that the separability section (32) renders enforceable any fragments of the Act which would be constitutional if they had been separately enacted, regardless of their relationship to, or the constitutionality of, the Act as a whole. The courts below adopted this view, Judge Manton going so far as to say that the separability clause "is a command by Congress

that valid fragments must be preserved if the warp and woof are torn away.'"[1]

We submit that the rule of statutory construction established by repeated decisions of this Court is to the contrary. We are aware of no decision in which this Court has isolated sections of an act from their context and, considering them in a vacuum, enforced them as separate enactments because they might have been constitutionally enacted separately. On the contrary, the Court has always considered sections specifically under review in their contextual relation to the act of which they were a part to determine whether the particular sections in themselves substantially fulfilled the legislative intent, or whether they were merely parts of a plan or objective elsewhere disclosed by the act, and, if the latter, whether that plan or objective was valid.

In *United States* v. *Butler*,[2] this Court, in considering the Agricultural Adjustment Act, said:

> "The Government, in substance and effect, asks us to separate the Agricultural Adjustment Act into two statutes, the one levying an excise on prices of certain commodities, the other appropriating public monies independently of the first. Passing the novel suggestion that two statutes enacted as parts of a single scheme should be tested as if they were distinct and unrelated, we think the legislation now before us is not susceptible of such separation and treatment. * * * The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired

[1] R. VIII, 2332.

[2] 297 U. S. 1, 58, 61 (1936).

> end. To do this would be to shut our eyes to what all others than we can see and understand."

Schechter Corp. v. *United States*[1] is a direct refutation of the plaintiff's theory, endorsed by Judge Manton, that the separability clause is a command to sustain a particular section though the "warp and woof are torn away." Mr. Justice Cardozo in his concurring opinion said:[2]

> "To take from this Code the provisions as to wages and the hours of labor is to destroy it altogether. * * * Wages and the hours of labor are essential features of the plan, its very bone and sinew. There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder."

Williams v. *Standard Oil Company*[3] is directly in point and closely analogous to the case at bar. There informatory provisions similar, *mutatis mutandis,* with those of section 5(b) of the Act here under consideration, calling for data affecting retail prices of gasoline, were held invalid, although intrinsically unobjectionable, where the price fixing scheme of which they were a part was held to be unconstitutional.

To the same effect are *Lemke* v. *Farmers Grain Co.*,[4] *Carter* v. *Carter Coal Co.*,[5] and, so far as we are aware, all of the decisions of this Court which have considered the question of separability.

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[1] 295 U. S. 495 (1935).

[2] *Id.*, at 554-555, quoted with approval in the majority opinion in *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936).

[3] 278 U. S. 235 (1929).

[4] 258 U. S. 50 (1922).

[5] 298 U. S. 238 (1936).

The decision principally relied upon by the District Court is *Weller* v. *People.*[1] There, the discarded portion of the Act (not considered but subsequently held invalid[2]) was but one of two coordinated regulatory provisions in a statutory scheme for licensing and regulating theater ticket brokers. This Court sustained the conviction of a broker who failed to obtain a license, saying, "In the absence of authoritative announcement of another view by some court of the state we shall hold this provision severable and valid." This was but in accordance with the rule previously announced in *Dorchy* v. *Kansas,*[3] that in the construction of state statutes the question of separability is primarily for the determination of the state courts. It should be noted that the decision in *Weller* v. *People* was strongly urged upon this Court in support of the separability of the informatory provisions of the statute involved in *Williams* v. *Standard Oil Co., supra.* The Court, however, rejected the argument as applied to the situation then before it, which was almost precisely analogous to that presented in this case.

In short, the courts below have construed the separability clause as though it read "If any section of this Act may, separately considered, be constitutional, it shall be separately sustained though the main purposes and declared objectives of the Act fail." As previously quoted, Judge Manton, in effect, expressly stated such to be the rule. Controlling decisions are clearly to the contrary.

Therefore, we must ask this Court to do what the courts below have refused to do, consider this Act as a whole with a view to determining its purposes and objectives.

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[1] 268 U. S. 319 (1925).

[2] *Tyson* v. *Banton,* 273 U. S. 418 (1927).

[3] 264 U. S. 286 (1924).

(b) *Reading sections 4(a) and 5 contextually with the Act, it is clear that they do not constitute a substantive regulation by themselves but are purely auxiliary to the control provisions described by 6 to 13.*

Congress has expressly declared the scope and purpose of its enactment. The Act is entitled "Title I—Control of Public-Utility Holding Companies." Section 1 is captioned "Necessity for Control of Holding Companies." 1(c) declares that the holding company "unless regulated is injurious to investors, consumers, and the general public," and the declared policy, in accordance with which "all the provisions of this title shall be interpreted (is) to meet the problems and eliminate the evils as enumerated * * *," and to that end to compel the simplification and the elimination of holding company systems.

It is difficult to conceive a more explicit expression of Congressional viewpoint and objective. Such declarations and objective, while not in themselves legislation, are of controlling significance in determining whether or not a fragment of the statute, when separated from the whole Act, may stand alone as an enactment of Congress. See *Carter* v. *Carter Coal Co., supra.* The declared purposes of the Act cannot be satisfied by informatory processes, but only by such regulation or control as will "eliminate" the evils.

Neither the plaintiff nor the courts below attempted to support section 4(a), standing alone, as a separable enactment of Congress. It was not contended that Congress intended, even if it had the power, absolutely to exclude holding companies from the uses of the mails and instrumentalities of commerce enumerated in 4(a). The section

itself clearly negatives any such intent in its opening words, "unless a holding company is registered". It is, as we have shown,[1] a penalty to coerce registration which must find support in some valid substantive regulation with which it compels compliance.[2] *Carter* v. *Carter Coal Co.*, described at page 71, *infra*. The question whether 5(b) is such a regulation must, therefore, depend upon whether the functions it was designed to perform are substantive or merely auxiliary to the control provisions of the Act, 6 to 13, inclusive.

Sections 6 to 13 are the bone and sinew of the Act. One may compare the alleged abuses or evils catalogued in section 1(b) with the provisions of these sections 6 to 13 and see how each one of them is proposed to be met. Thus it is proposed to eliminate the evils enumerated in subdivision (1) of 1(b) in connection with the issue of securities by the provisions of sections 6 and 7, giving the Commission complete control of the issue and sale of securities. Subdivision (2) of 1(b) relating to service contracts is covered by the provisions of section 13, giving like control over the making and performance of such contracts. Subdivision (3) with respect to rate, dividend, and other policies finds its corrective in section 12 controlling financial practices. Subdivision (4) relating to extension and integration of operating properties is covered by sections 9 and 10, governing acquisitions, and by 11, governing corporate reorganization and simplification. And subdivision (5) relating to general

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[1] See pp. 36-37, *supra*.

[2] In his concurring opinion, Judge Learned Hand, although stating that section 4 is "not merely a sanction *in terrorem*", recognizes the principle for which we contend, namely, that section 4 can only be sustained if some of the principal features of the control system are valid.

lack of economies and efficiency and effective public regulation is presumably to be compensated through the application of the coordinated system of controls prescribed by all these sections.

Sections 4(a) and 5, reinforced by the heavy penalties of 29, merely implement this system of controls. 4(a) coerces holding companies to register. Unless excluded or exempted under 2(a)(7) or 3(a), they must register or suffer outlawry, though they do nothing but continue to own the securities of their subsidiaries. 5(a) provides the mechanics for registration, and 5(b) provides for furnishing the basic information concerning the companies upon which the controls specified by 6 to 13 are to operate.

The physical and functional relation of sections 4(a) and 5 to the control provisions demonstrate that Congress intended that they should be inseparable from these provisions:

> (1) Section 5(b) can have no functional relation to the process of registration because the process must be fully accomplished before the requirements of 5(b) become effective.
>
> (2) This section likewise can have no functional relation to 4(a), which ceases to have any legal effect when registration is accomplished.
>
> (3) 5(b) cannot act as a regulation by itself because it gives purely inquisitorial powers to the Commission which, considered by themselves, are not related or confined to the regulation of interstate commerce.
>
> (4) It, therefore, can only function as an integral part of the system of control imposed upon registered companies and their subsidiaries.

The prohibitions of 4(a) in terms apply only to non-registered holding companies. 5(a) provides the method of registration; the subsequent provisions, including 5(b), apply only to registered companies and their subsidiaries and are concerned with or related to the control of such companies by the Commission. Thus the Act itself divides these companies into two groups and all of its provisions are divided accordingly. 4(a) is included among the provisions applicable to non-registered companies. 5(b) is included among the provisions relating to Commission control of registered companies. It is thus not only auxiliary to, but a part of, the Commission's control over those companies. Conclusion follows that Congress did not intend the registration statement to be filed if all of the control provisions of the Act to which it is related should be held unconstitutional. *Williams* v. *Standard Oil Co., supra.*

To avoid this otherwise inescapable conclusion, Judge Mack and Judge Manton lifted section 5(b) out of its functional setting and endowed it with a new function neither contemplated nor prescribed by the Act viewed as a whole —indirect regulation, through the restraining influence of publicity, of the transactions prohibited to non-registered companies by 4(a).

In theory, publicity may have beneficial effects in curbing evil practices but this was not the purpose of Congress in enacting section 5. Publicity of the registration statement is not required. Contrast section 22 which conditions the disclosure of information in "any statement" on the Commission's judgment that such disclosure is in the interest of the public, investors, or consumers, and makes it unlawful to disclose information in any "document filed with the Commission which is not made available to the

public pursuant to this section" with the explicit provisions of the Securities Act of 1933 (sec. 6(d)) that the information contained in the registration statement "shall be made available to the public * * * and copies thereof * * * shall be furnished to every applicant * * *". Publicity under the Securities Act is further secured by the requirement of the delivery of a prospectus based on the registration statement to every prospective purchaser of the securities.

If one checks serially the information indicated in section 5(b) with the transactions prohibited by 4(a), it becomes manifest that 5(b) cannot perform any such function as Judge Mack and Judge Manton have ascribed to it. The enumeration in 5(b) is indicative of the type of information to be furnished. It relates to financial structure, security issues, compensation of officers and directors, bonus and profit-sharing arrangements, service, sales and construction contracts, balance sheets, profit and loss statements of all companies in the holding-company system. It thus furnishes a diagnostic chart of the corporate interrelationships and financial transactions which are to be regulated or controlled by the Commission under 6 to 13.

The activities prohibited to unregistered companies by 4(a) are (1) sale or transportation of gas or electricity in interstate commerce, (2) performance of service contracts, (3) distribution of securities, (4) acquisition of securities or assets, (5) any business in interstate commerce, and (6) ownership of securities of subsidiaries doing any of the acts enumerated in (1) to (5). No information is called for by 5(b) having any reasonable relevance to any of the activities specified in these subdivisions of 4(a), except those enumerated in (2) and (3). Thus 4(a) (2) prohibits the performance of service contracts. 5(b) (2) (F) re-

quires information as to such contracts. A relationship would appear to be established, but when we read 13 we find that further performance of these contracts is absolutely prohibited to the registered company. Service may continue to be rendered, but only under the rules and regulations of the Commission, and by specially created agencies. Thus we have this situation: 4(a) prohibits the unregistered company from the use of the mails and instrumentalities of interstate commerce in the performance of service contracts; immediately upon registration and before any information is filed concerning these contracts under 5(b), 13 destroys the existing contract relationships. The requirement of 5(b) cannot, therefore, be a regulation by publicity of contracts prohibited by 4(a), but can only serve to enable the Commission to enforce the provisions of 13 applicable to the registered holding company and its subsidiaries.

Similar considerations arise in connection with section 4(a) (3) which prohibits security sales by unregistered companies through the mails and instrumentalities of interstate commerce. Immediately upon registration, and before any information is filed under 5(b), all such security sales are controlled by the provisions of 6 and 7. Consequently, the requirement of 5(b) is not a regulation by publicity of the use of the mails and channels of commerce in sales of securities under 4(a) which after registration are completely regulated by 6 and 7. Furthermore, 4(a) (3) prohibits equally sales of any public utility or holding company securities whether within or without the system, and the latter cannot possibly be affected or regulated by intra-system information called for by 5(b).

In other words, with respect to those two subdivisions in which there is any seeming relationship between sections 4(a) and 5(b), the formula is, briefly, that 4(a) prohibits the transactions unless the Company is registered, and *instanter* upon registration this conditional prohibition becomes absolute, except as the controls of 6 to 13 are invoked, and is not avoided or affected in any way by furnishing the information required by 5(b).[1] Thus it is clear that 4(a) and 5 are designed to implement these controls and have no separable function.

(c) *The legislative history of the Act shows that control, not publicity, was intended.*

In view of the structure of the Act, its express provisions, their functional relationship to each other, and the legislative objectives expressly declared, it seems superfluous to search the legislative record for evidence of what Congress intended to accomplish by the enactment of section 5(b). But for convenience of reference we have set forth in Appendix A (p. 127, *infra*) materials which amply demonstrate that Congress did not intend 4(a) and 5 to perform any other office than to invoke, and aid in the administration of, the control system.

Not a word is cited, or may be cited, from the record that publicity without control would satisfy the objectives of Congress. The fragmentary quotation in the opinion of the District Court from the testimony of Commissioner

[1] It should be noted that a registered holding company must file the same information regardless of how it comes to grips with section 4(a), or, indeed, whether it is forced to register solely by virtue of 4(b). This is another indication of the obvious fact that 5(b) was not intended to regulate by publicity the activities specified in 4(a).

Healy as to the value of publicity such as was already required under the Securities Act of 1933 distorts the effect of his testimony, which read as a whole shows very clearly that the objective of those who prepared and supported the bill was control, and not publicity without control.[1]

Judge Mack's references to the testimony of utility executives presents the situation in bold relief.[2] They were arguing that a system of publicity was all that was required; the proponents of the measure were insisting that nothing but control would satisfy their objective. Conclusion that nothing less will accomplish the manifest objective of the Act is irresistible unless one misreads its provisions.

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[1] Commissioner Healy stated (Hearings before House Committee on Interstate Commerce on H. R. 5423, pp. 133-134):

"I can illustrate my conception of this situation by the following recital: Let us look at a State which has a blue-sky commission and also a public-service commission. Now, the blue-sky commission in most of the States has authority to pass on the sale of all new securities that come along, all kinds, but at the same time operating right along beside it is the State public-service commission, dealing with public-service companies, saying that they will regulate what they sell, what they charge, and what securities they can issue.

"The Securities and Exchange Commission, so far as the Securities Act is concerned, is somewhat like the State blue-sky commissions, whereas the commission that handles this bill will be something like a public-service commission, so far as the public-utility holding company is concerned."

There ensued the following colloquy (p. 134):

"Commissioner Healy: 'It is the fellow out in the sticks who got the worst drubbing so far as these securites are concerned. Nevertheless I agree with you that there are a great many people in the country that cannot understand a financial statement, no matter how simply it is written.'

Mr. Martin: 'The only real remedy would be to decide that the thing is harmful and prohibit it.'

Commissioner Healy: 'Is that not about what this act does, Mr. Martin?'"

[2] R. VIII, 2189-2190.

III.

Standing by themselves, sections 4(a) and 5 of the Act are not a constitutional, valid and reasonable regulation of interstate commerce and the mails.

(a) *Section 5(a) is not a regulation of commerce or of the mails, nor is it claimed to be. 5(b), relied upon alone to support the penalties of 4(a), is not regulatory of the transactions prohibited by 4(a), nor of any business in interstate commerce.*

Section 5(a) merely requires the filing of a notification of registration in such form as the Commission may prescribe. The form as set forth in the record consists of little more than name, post office address, outline of financial structure and names of officers and directors (p. 32, *supra*). It is not a regulation of interstate commerce or of the mails, nor is it claimed to be by the plaintiff or either court below.

The documents and information required by section 5(b) are those which the Commission may prescribe "relating to the registrant or any of its associate companies". The information required is such as the Commission may deem necessary or appropriate in the public interest or for the protection of investors and consumers. Since the District Court has found that the business of the defendant holding companies in or affecting interstate commerce consists only of those activities forbidden by 4(a) (other than 4(a) (5)),[1] and we have shown above (pp. 62-64, *supra*) that requiring the information called

[1] Opinion, R. VIII, 2207.

for by 5(b) does not regulate such activities, it does not, in fact, regulate any interstate commerce.

Furthermore, its very terms indicate that information is to be furnished concerning transactions not in or affecting interstate commerce, concerning companies not engaged, in any degree, in such commerce, and transactions not consummated by aid of the use of the instrumentalities of commerce or of the mails. All of it must be filed even if all activities in interstate commerce or uses of the mails or instrumentalities of such commerce are abandoned, unless the holding company ceases to be a holding company (5(d)).

The form of registration statement adopted by the Commission shows how unrelated the information sought is to the regulation of interstate commerce. Corporate and financial data are required *from* companies engaged in no such commerce, *concerning* companies engaged in no such commerce, and concerning activities of all the companies which cannot conceivably constitute or directly affect such commerce.[1]

The federal government has no concern with the information indicated by section 5(b) (p. 62, *supra*), and called for by the form prescribed thereunder, pertaining to purely intrastate utility or non-utility subsidiaries, except as at some time some particular information may become relevant to a particular activity constituting or directly affecting interstate commerce.

Certainly if this statute were so drawn as to apply directly to these intrastate subsidiaries, requiring them to register and furnish this information under penalty for refusing, it could not be sustained as an exercise of the federal commerce power. But this result is obtained indi-

[1] Form U5B, adopted October 2, 1936.

rectly through compulsion applied to the parent holding companies.

Interstate Commerce Commission v. *Goodrich Transit Company*,[1] relied on in the opinion of the District Court to sustain section 5(b), is inapplicable except that it is clear authority against its separability from the control provisions of the Act. It was there held that the accounting provisions of the Interstate Commerce Act authorize the Interstate Commerce Commission to supervise the accounting system of an intrastate subsidiary of a carrier subject to the act, as a means to obtain information necessary to regulation of interstate rates. It expressly held that the requirement to furnish such information was not the exercise of a substantive power of regulation, but was merely adjective to the power to regulate interstate rates.

Under the rule in this case, if the control system of this Act were valid, section 5(b) would likewise be valid as an adjective provision appropriate to the administration of that system. But treating it as a substantive regulatory provision by itself, it cannot be sustained because not a regulation of interstate commerce.

(b) *Standing by itself, section 5(b) is a naked grant of inquisitorial or visitatorial powers and is invalid because no such powers may be exercised by federal authority except in aid of a granted power.*

If section 5(b) is considered, standing alone, as a regulation in the nature of an informatory requirement conditioning the use of the instrumentalities of interstate commerce and the mails, it must fall because the authority attempted to be granted to the Commission is purely inquisitorial, and is not a substantive power in itself. It is

[1] 224 U. S. 194 (1912).

well settled that Congress is without constitutional authority to grant inquisitorial powers to any agency unless they are to be exercised in aid of one or more of the constitutional powers of the federal government. *Federal Trade Commission* v. *American Tobacco Co.*;[1] *Harriman* v. *Interstate Commerce Commission*;[2] *Kilbourn* v. *Thompson*;[3] *In re Pacific Railway Commission*,[4] cited with approval in *Jones* v. *Securities and Exchange Commission*;[5] *Sinclair* v. *United States*.[6]

Since section 5(b), reduced to its essentials, merely provides that holding companies shall file such information or documents regarding themselves and all their associate companies "as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers", the formula developed by the courts below is that Congress may condition the use of the instrumentalities of interstate commerce and the mails on furnishing any information which its agent may require in its conception of the public interest.

By virtue of sections 4(a) and 5, taken in conjunction with 14 and 22, if at any time a public utility holding company engages in any business in interstate commerce, or if only once it finds it necessary in the course of its business to use the facilities of interstate commerce or the mails in any of the transactions specified in 4(a), or to own securities of companies doing any of these things, it must for all time subject itself to the authority of the Commission to require disclosure and publication of business informa-

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[1] 264 U. S. 298 (1924).
[2] 211 U. S. 407 (1908).
[3] 103 U. S. 168 (1880).
[4] 32 Fed. 241.
[5] 298 U. S. 1 (1936).
[6] 279 U. S. 263 (1929).

tion unrelated to any business or transaction within the sphere of constitutional control. Such authorization is purely inquisitorial and beyond the powers of Congress.

(c) *Section 5(b) considered by itself unlawfully delegates legislative power to the Commission.*

If section 5(b) be considered without reference to the subsequent regulatory provisions of the Act it becomes a naked delegation of legislative power. There is no guide left for the Commission to determine to what public interest the information to be called for should relate, or what to do with the information, except to treat it as confidential or publish it (22(a)), as again it would determine solely in its conception of the public interest (see Point IV(3), pp. 98-102, *infra*, and cases there cited).

(d) *Section 5(b) cannot be supported by 4(a) which, being merely a penalty, cannot validate regulations with which it coerces compliance. Assuming power to exclude holding companies from interstate business and normal use of the mails and instrumentalities of interstate commerce, such power cannot be used to coerce compliance with unconstitutional regulation.*

The plaintiff and the courts below have made no attempt to show that section 5(b), standing by itself, is a valid regulation of commerce or the mails. The opinions of the courts below do not analyze, and make no substantial comment upon, the content of 5(b). The power of Congress to regulate the transactions specified in 4(a) is demonstrated exhaustively in order to support the power to exact the information called by for 5(b), without regard to the

intrinsic quality of 5(b) as a regulation within the powers of Congress. In other words, the penalty is used to support the regulation, instead of the validity of the regulation being established to support the penalty. This is, of course, a complete *non sequitur*. Had the plaintiff sought to compel registration by means of 4(b), the mandatory requirement, no use could have been made of 4(a) in the constitutional argument. Regulations are not validated by the choice of the means used to compel obedience thereto.

The exact situation is aptly described in both the prevailing and minority opinions in *Carter* v. *Carter Coal Company, supra*. Both agreed that the so-called tax imposed by the "Bituminous Coal Conservation Act of 1935", conditioned on failure to subscribe to a code, was a penalty which could not be exacted of an operator who refused so to subscribe, unless the system of regulation imposed upon code members, considered by itself and apart from the tax, was within the powers of Congress. The disagreement was solely as to the separability of the two regulatory titles of the Act, which related respectively to labor regulation and price fixing. Mr. Justice Sutherland said:

> "It is very clear that the 'excise' tax is not imposed for revenue but exacted as a penalty to compel compliance with the regulatory provisions of the Act. * * * But it is not necessary to pursue the matter further. That the 'tax' is, in fact, a penalty is not seriously in dispute".[1]

Mr. Justice Cardozo said:

> "A different situation would be here if a portion of the statute, and a portion sufficient to uphold the regulatory penalty, did not appear to be valid. If

[1] 298 U. S. at 289.

> the whole statute were a nullity, the complainants would be at liberty to stay the hand of the tax-gatherer threatening to collect the penalty, for collection in such circumstances would be a trespass, an illegal and forbidden act. * * * It would be no answer to say that the complainants might avert the penalty by declaring themselves code members (§3) and fighting the statute afterwards. In the circumstances supposed there would be no power in the national government to put that constraint upon them. The Act by hypothesis being void in all its parts as a regulatory measure, the complainants, might stand their ground, refuse to sign anything, and resist the onslaught of the collector as the aggression of a trespasser".[1]

The classic method adopted by draftsmen desirous of usurping for the federal government an authority which it does not possess has hitherto been to impose a tax for failure to submit to regulation. See *Child Labor Tax Case;*[2] *United States* v. *Butler, supra.* The draftsmen of this Act have discovered a new and more dangerous type of penalty—depriving persons of the ordinary civil right to engage in interstate commerce and to use its facilities and the mails if they do not submit to a system of federal control unrelated to such commerce and such use. In whatever form the penalty for failure to submit be disguised, however, its nature as a penalty remains the same.

The authorities relied on by the government and the courts below to support section 5(b) because of the power of Congress over the transactions specified in 4(a) are the

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[1] *Id.*, at 338.

[2] 259 U. S. 20 (1922).

so-called "evil" cases.[1] They have no bearing on the validity of these sections. In all of them the federal power upheld was that of preventing misuse of the channels of interstate commerce and of the mails. In most of the cases, the statute regulated by *absolutely* prohibiting the interstate transportation of goods deemed evil, or the immediate effect of the transportation of which was the consummation of an evil, or which were intended to be used contrary to the laws of the state of destination. In the remainder of the cases, instead of an absolute prohibition, some use of the facilities of commerce deemed by Congress to be evil under certain circumstances was conditioned on compliance with regulations designed to assure that the projected use was not made under such circumstances. In practice, these statutes often compelled persons to do things which admittedly only the state could compel them to do by direct legal compulsion; but the only means of compulsion used was the closing of the channels of interstate commerce or the mails to the tainted article or "evil" transaction. In no case did the federal statute upheld have any compelling effect whatever on persons who refrained from using the mails and the channels of interstate commerce for the particular purpose found by Congress to be "evil" or likely to result in "evil." In other words, the regulations upheld were of the *use* of the channels of inter-

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[1] *Champion* v. *Ames,* 188 U. S. 321 (1903); *Missouri K. & T. R. Co.* v. *Haber,* 169 U. S. 613 (1898); *Pittsburgh Melting Co.* v. *Totten,* 248 U. S. 1 (1918); *Hipolite Egg Co.* v. *United States,* 220 U. S. 45 (1911); *Caminetti* v. *United States,* 242 U. S. 470 (1917); *Brooks* v. *United States;* 267 U. S. 432 (1925); *Clark Distilling Co.* v. *Western Md. Ry. Co.,* 242 U. S. 311 (1917); *Kentucky Whip & Collar Co.* v. *Illinois Cent. R. R. Co.,* 299 U. S. 334 (1937); *Jones* v. *Securities and Exchange Commission,* 79 F. (2d) 617 (C. C. A. 2d, 1935).

state commerce, not of the *user*. See *Burco, Inc.* v. *Whitworth, supra.*

Sections 4(a) and 5, considered by themselves, are in striking contrast to all such statutes. 4(a), instead of prohibiting uses of the mail or channels of interstate commerce found by Congress to be evil or likely to result in harm, prohibits a multitude of activities in interstate commerce and uses of the mails and the channels of interstate commerce which have not been and could not be found by Congress to be harmful or likely to result in harm. These prohibitions are not absolute but are conditioned on the failure to submit, by registration, to the requirement that information be filed unrelated to the specific uses of the mails and facilities of commerce prohibited. This requirement is enforceable by fine and imprisonment, not by exclusion from the mails or the channels of commerce. And, once having registered, the holding companies may never escape from the obligation to furnish this information and to supplement it when required by the Commission (14 and 22), even by giving up all interstate commerce and all uses of its channels and of the mails.

The decision in *Jones* v. *Securities and Exchange Commission, supra,* marks the distinction between a valid regulation of the use of the mails and the facilities of interstate commerce and the statute here involved. In the *Jones* case the statute prohibited the use of the mails and the instrumentalities of interstate commerce for the distribution of securities not previously registered. The activities of Jones were not subject to Commission investigation except in connection with the specific proposed use of the mails and facilities of interstate commerce. Having filed his registration statement so that he might be free to use such facilities in a proposed transaction, he was entitled to withdraw it

when he had decided not to use them, and upon doing so no further inquiry regarding his activities was warranted.

The imaginary statute constructed by the District Court is clearly unconstitutional under the principle of *Hammer* v. *Dagenhart*.[1] There the statute prohibited the transportation in interstate commerce of products of child labor. The Court held this prohibition unconstitutional because its purpose and effect was to prohibit the industrial employment of children—an objective beyond the power of Congress. Nothing in the dissenting opinion indicates that any member of the Court would sustain a federal statute forbidding an otherwise lawful use of the mails and channels of interstate commerce unless the user thereof submits his business to federal regulation in matters unrelated to such use. It has never been suggested that, even if Congress could prohibit interstate shipments of the products of child labor, it could prohibit manufacturers from using the mails or facilities of commerce for any purpose unless they register, and then prohibit "registered" manufacturers, under pain of fine and imprisonment, from forever employing children in any business.

The record of the defendant companies before the Court (as briefly summarized in our factual statement, pp. 14-22, *supra*) is clear refutation of any valid premise that the holding company is *per se* an evil agency incapable of any but harmful effects. Without claiming for it any counsel of perfection and admitting its liability to human error, the record of constructive achievement of these defendant companies which have been chosen by the Government as typical of the industry, makes preposterous any legislative postulate that the holding company is an inherently evil

[1] 247 U. S. 251 (1918).

thing comparable to white slavery, gambling devices, adulterated drugs or the art of thievery.

The Act itself expressly refutes any such factual finding by Congress. By section 1(c) it is declared that when certain practices with respect to capitalization, services and growth of properties become widespread, "the holding company becomes an agency which *unless regulated* is injurious" to the public. The postulate of the Act thus is that the holding company must be regulated with respect to specific practices, not that its business must be prohibited because of fraud, immorality or evil design.

Even assuming that section 4(a) would have been valid as a regulation if standing alone, a statute which permits the avoidance of a regulation or prohibition, constitutional if standing alone, only on compliance with a less onerous but unconstitutional regulation, is invalid. *Frost Trucking Co.* v. *R. R. Comm.*;[1] *Western Union Tel. Co.* v. *Foster*;[2] *Western Union Tel. Co.* v. *Kansas*;[3] *Pullman Co.* v. *Kansas*;[4] *cf. United States* v. *Butler, supra; United States* v. *Constantine*.[5] As was said by Mr. Justice Holmes in *Western Union Tel. Co.* v. *Foster, supra:*

> "a constitutional power cannot be used by way of condition to attain an unconstitutional result."

(e) *Section 4(a), standing by itself, contravenes the Fifth, Sixth and Eighth Amendments to the Constitution.*

The peculiar and unusual form of penalty invoked by section 4(a) presents a further constitutional question, dis-

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[1] 271 U. S. 583 (1926).
[2] 247 U. S. 105 (1918).
[3] 216 U. S. 1 (1910).
[4] 216 U. S. 56 (1910).
[5] 296 U. S. 287 (1935).

tinct from that raised by 5(b). The ordinary civil rights to use the mails and instrumentalities of commerce are denied, except upon compliance with a regulation which has nothing to do with the exercise of the rights denied. For illustration, a holding company is denied the right to transmit gas and electricity in interstate commerce unless it complies with regulations imposed to govern other transactions which, if we assume they may be within the federal regulatory power, are yet utterly unrelated to the specific act in commerce which is prohibited. Thus, defendant Utah Power & Light Company is prohibited from transporting electricity from Idaho to Utah unless it furnishes information, and otherwise submits to regulation, concerning its relationships to the Western Colorado Power Company which is entirely isolated from its Idaho-Utah system and cannot possibly affect its interstate transactions between Idaho and Utah.

Such a prohibition is purely a penalty, not a regulation of interstate commerce within the meaning of the commerce clause; since it is imposed and sought to be justified by past evils or abuses to which it is *ex post facto* and is enforceable by injunction, it raises the constitutional doubts under the Sixth and Eighth Amendments expressed by Mr. Justice Brandeis in *Milwaukee Publishing Co.* v. *Burleson.*[1] And even if the prohibition is considered as a regulation, which it clearly is not, it is an arbitrary deprivation of property without due process in violation of the Fifth Amendment.[2]

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[1] 255 U. S. 407 (1921).

[2] See authorities cited under Point IV (4), pp. 102-111, *infra.*

IV.

The substantive regulatory system prescribed by the Act is unconstitutional.

Counsel for plaintiff have hitherto refused to consider or discuss the validity of the control system. Defendants have contended throughout that (1) it is not a regulation of interstate commerce or of the mails, (2) it invades the rights reserved to the states under the Tenth Amendment, (3) it is an unconstitutional delegation of legislative power to the Commission, and (4) it offends against the Fifth Amendment.

(1) The Act is not a regulation of interstate commerce or of the mails.

(a) *The companies comprising the industry sought to be regulated, operating and holding companies alike, are engaged in an essentially and fundamentally local business.*

The principal functions of the operating utilities are the production and retail distribution of gas and electricity within the states in which they operate—functions which factually and legally are solely intrastate and have been so recognized by the proponents of the Act.[1] As we have shown many of the operating companies in the Bond and Share system, and generally important ones, confine their activities entirely within a single state and have no interstate contacts whatsoever.[2] The fact that other companies

[1] See pp. 26-27, *supra*.

[2] See p. 28, *supra*.

produce electricity or gas in one state and carry it to market in another where it is sold at retail by the producing companies does not affect the intrastate character of either the production or the retail distribution. The transmission or pipe line is not a facility of commerce as that term is commonly used.[1] The decisions of this Court are decisive that the generation of electricity and the production of gas constitute intrastate commerce, subject exclusively to state regulation, even though the electricity or gas is immediately transmitted across state lines;[2] and similarly, that the retail distribution of gas and electricity is a purely intrastate activity despite the fact that such gas or electricity may have been produced in another state.[3]

Some of the other operating companies in the system do make interstate wholesale sales of gas and electricity across state boundaries and such sales do undoubtedly constitute interstate commerce.[4] Such sales, however, con-

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[1] See *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 339 (1936), in which this Court said: "We suppose that in the early days of mining in the West, if the Government had undertaken to operate a silver mine on its domain, it could have acquired the mules or horses and equipment to carry its silver to market. And the transmission lines for electric energy are but a facility for conveying to market that particular sort of property * * *." See also p. 28, *supra*.

[2] *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165 (1932); *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284 (1927).

[3] *Public Utilities Commission of Kansas* v. *Landon*, 249 U. S. 236 (1919); *East Ohio Gas Company* v. *Tax Commission of Ohio*, 283 U. S. 465 (1931); *South Carolina Power Co.* v. *South Carolina Tax Commission*, 52 F. (2d) 515 (E. D. S. C., 1931), aff'd *sub. nom. Broad River Power Co.* v. *Query*, 288 U. S. 178 (1933).

[4] *Missouri* v. *Kansas Natural Gas Company*, 265 U. S. 298 (1924); *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). Even as to wholesale sales of electricity or gas across state lines, state commissions have adequate power to protect ultimate consumers against excessive prices charged for inter-company sales. *Western Distributing Co.* v. *Public Service Commission of Kansas*, 285 U. S. 119 (1932).

stitute an almost negligible portion of the operating companies' business (see p. 13, *supra*). It should be reiterated here that these interstate wholesale sales and the interstate transmission of gas and electricity are not a subject of regulation under the Act. The electric sales are fully regulated by Title II of the Public Utility Act of 1935, of which this Act is Title I. There is pending before the present Congress a bill providing for similar regulation of interstate gas sales.[1]

The non-utility subsidiaries in the Bond and Share system, which are subjected to the same regulation as the utility subsidiaries, are engaged in various purely local enterprises[2].

As previously shown,[3] most of the holding companies, as such, are purely investment companies which in their own corporate capacity do no interstate business. The fact that some of the subsidiaries of such holding companies engage in some interstate commerce by making wholesale sales of gas or electricity across state boundaries does not make the ownership of a controlling interest in the stock of such companies interstate commerce, or subject the stockholder to federal regulation by mere reason of such ownership.[4] Nor does the fact that the subsidiaries of a holding company may operate within many different states change the character of its activities from intrastate to interstate commerce.

It may be that some of the services rendered by American Gas and by Ebasco Services Incorporated, Bond and

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[1] H. R. 6586, 75th Cong., 1st Sess.

[2] See p. 13, *supra*.

[3] See p. 11, *supra*.

[4] *Northern Securities Company* v. *United States*, 193 U. S. 197, dissenting opinion p. 369, majority opinion p. 344 (1904).

Share's wholly owned subsidiary, do constitute or directly affect interstate commerce; most of the services rendered, however, are purely intrastate (see pp. 84-85, *infra*). The only incidence of the regulatory provisions of the Act upon such service business is section 13, which regulates in all-inclusive and inseparable terms both the intrastate services rendered by these companies and those which may be held to constitute or affect commerce. This section applies to none of the defendants except Bond and Share and American Gas, and the Act does not condition regulation of any of the defendants upon the existence of any service arrangements, whether in interstate commerce or not.

(b) *None of the substantive control sections of the Act regulates or is confined to the regulation of activities constituting or directly affecting interstate commerce.*

We do not deny that individual companies subject to the Act engage either regularly or incidentally in interstate commerce or in activities which directly affect such commerce, nor do we contend that the power of the federal government to regulate *those activities* is dependent in any way upon the proportion of business done in interstate commerce in relation to the whole or upon the character of the activities as continuous or incidental. But we do contend that this Act is invalid because not predicated upon or confined to the regulation of interstate companies and activities.

Sections 6 and 7 regulate the issuance and sale of securities of companies in the system by giving the Commission power to disapprove the issuance or sale if it believes the transaction economically unwise or inappropriate, quite without regard to the regulation of interstate commerce.

Securities of all kinds are frequently sold by use of the mails and channels of interstate commerce, and Congress may prescribe regulations, as it has done in the Securities Act of 1933, to assure that such facilities will not be misused, as for the promotion of fraud, etc.[1] But sections 6 and 7 are not confined to sales in interstate commerce; they apply to the *issuance* of securities, whether they are to be privately or publicly distributed and whether or not issued by a company engaged in interstate commerce, and to their sale, whether or not the mails or channels of commerce are to be used. The objective is not to free the channels of commerce from fraudulent or potentially fraudulent articles. The negative power of preventing a misuse of the mails or channels of commerce does not comprehend the affirmative power to prescribe what the user of such facilities must do in the conduct of its business. While Congress may tell a producer that he may not sell in interstate commerce certain goods deemed harmful or potentially harmful, it may not tell him what he shall or shall not produce.

By section 8 certain acquisitions of an interest in competing electric and gas utility companies are prohibited unless approved by the state commission involved. Congress is here seeking to implement and anticipate state laws on a subject peculiarly within state concern. The prohibition has no relation to interstate commerce or to the use of its facilities.

Sections 9 and 10 regulate all acquisitions of securities, utility assets and "any other interest in any business" by a holding or subsidiary company by giving the Commission control over the substance of such transactions.

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[1] *Jones* v. *Securities and Exchange Commission*, 79 F. (2d) 617 (C. C. A. 2d, 1935).

Section 12 regulates, among other things, all payments of dividends, retirements and redemptions of securities, sales of utility assets, sales of any securities held by companies within the system (as distinguished from securities issued by such companies), solicitation of proxies, intercompany loans, and all transactions "not otherwise unlawful under this title" between companies in the same holding company system.

In the foregoing sections, as everywhere else in the Act, there is entire absence of functional relationship of the activities controlled to interstate commerce or to the use of the mails. Thus, control of the issue of securities is not limited to those of companies engaged in interstate business (as it is in Title II of the Public Utility Act[1]), nor is control of the acquisition of securities or properties conditioned upon the purchase being of securities of interstate companies or property to be used in interstate business.[2] Nor are there any similar restrictions in the financial and other prohibitions or regulations of section 12. Congress has not found that any of these transactions burden or affect interstate commerce nor is such a finding by the Commission a condition precedent to their regulation. They are regulated whether or not the mails or facilities of interstate commerce are used in their consummation.

Section 11 we have already described as proscribing all holding company systems except those constituting "an integrated public utility system" and as proscribing all holding companies beyond the second degree. No finding is made by Congress or is required to be made by the Commission that any non-integrated holding company system

[1] Sections 201 (b) and (e) and 204.

[2] *Cf.* Title II, sec. 203.

is a burden upon commerce and, of course, no such finding could be made. There is no connection between the number of states within which the different subsidiaries of a single holding company operate and the regulation of interstate commerce. There is no connection between the number of companies interposed between the local operating utility and the top holding company and the regulation of interstate commerce. This section, like all other provisions of the Act, embraces many companies which have no interstate contacts whatsoever.

Section 13 prohibits holding companies from performing service contracts and prohibits subsidiaries from performing such contracts for domestic associates except at cost and subject to such rules, regulations, limitations and prohibitions as the Commission may prescribe. The interstate or intrastate nature of the services previously rendered by Bond and Share and now rendered by Ebasco was the subject of an exhaustive opinion in *Federal Trade Commission* v. *Smith*.[1] In that case, although holding that certain purchasing services constituted or directly affected interstate commerce, the court found that most of the advisory services rendered were purely local in nature and not subject to federal control. The court stated:

> "From what has been made to appear to the court, it is plain that the services performed by respondent on behalf of the holding and subsidiary operating companies, and which, broadly speaking, relate to legal, engineering, secretarial, fiscal, investigatory, and general advisory matters, are not such as will here avail the petitioner. Without analyzing the services rendered by respondent within the foregoing classifications, I shall content

[1] 1 F. Supp. 247 (S. D. N. Y. 1932).

> myself by concluding that they have to do with activities which, under authoritative decisions, are not recognized as constituting interstate commerce."[1]

Assuming that some of the purchasing services rendered by Ebasco may constitute or directly affect interstate commerce, section 13 does not distinguish between those services and the other general supervisory services which are purely intrastate.[2] Abandonment of these purchasing services would not affect the impact of this section. Nor is any distinction drawn between services performed for operating companies which are engaged in some measure in interstate commerce and those performed for operating companies which do no interstate business whatsoever. *Cf. Smith* v. *Illinois Bell Telephone Co.*[3]

It is apparent from this brief analysis that the Act is not a regulation of interstate commerce. Comparison with the Wagner Labor Act, sustained by this Court in the *Jones & Laughlin* case, *supra,* makes the distinction which

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[1] Citing *Graniteville Manufacturing Company* v. *Query,* 283 U. S. 376 (1931); *Hemphill* v. *Orloff,* 277 U. S. 537 (1928); *Moore* v. *New York Cotton Exchange,* 270 U. S. 593 (1926); *Blumenstock Brothers Adv. Agency* v. *Curtis Publishing Co.,* 252 U. S. 436 (1920); *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539 (1917); *United States Fidelity & Guaranty Company* v. *Kentucky,* 231 U. S. 394 (1913); *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495 (1913); *Engel* v. *O'Malley,* 219 U. S. 128 (1911); *Federal Base Ball Club* v. *National League,* 259 U. S. 200 (1922).

[2] The purchasing services rendered by Ebasco constitute a minor and separable portion of its business; of the 361 persons employed by it for the rendition of services, only 11 are employed in the purchasing department (Ex. 53, R. V, 1066-1069). These activities could be fully and effectively regulated by themselves; regulation of the rest of Ebasco's business is not necessary therefor.

[3] 282 U. S. 148 (1930).

controls decision abundantly clear, for in that case the Chief Justice said of the act there involved:

> "It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds * * *. It is the effect upon commerce, not the source of the injury, which is the criterion. (Cases cited.) Whether or not particular action does affect commerce in such a close or intimate fashion as to be subject to Federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise."

The Act here in question cannot be construed as contemplating the exercise of control within any such constitutional bounds and must fail upon the same grounds as the National Industrial Recovery Act. *Schechter Corp.* v. *United States, supra.*

(c) *The Act is not a valid regulation of the use of the facilities of interstate commerce or of the mails.*

Since it is apparent from what has been said before that the activities sought to be regulated by the Act do not constitute or directly affect interstate commerce, the Act, as written, is clearly invalid. In his concurring opinion in the Court below, however, Judge Learned Hand stated (R. VIII, 2334):

> "* * * Sections 6 and 7 lay out a system of control over the issuance and sale of securities; §§9 and 10, over their acquisition. I am by no means sure that all parts of these sections are valid; for example, those which forbid the use of other means ('or otherwise'), than the mails and interstate com-

merce; again, some of the regulatory discretions vested in the Commission. But when all these doubtful provisions are deleted, a workable system of controls would still be left, which §5 would implement."

We fail to see how any court could rewrite these sections of the Act, as thus suggested. The "regulatory discretions" vested in the Commission are part and parcel of these provisions; it is not explained which of them are to be deleted or how the sections are to be made workable without them. Suggestion that they may be eliminated or controlled by any standards other than those prescribed misconceives the basic premise of the Act, namely, that the utility holding companies and their subsidiaries shall not be permitted any liberty of management of those corporate affairs which affect their balance sheet position, as represented by their assets and counterbalancing liabilities. The very heart of these sections is that no company in the system, without approval of the Commission of the substance of the transaction—its economic value—shall either acquire an asset or create a liability. By thus vesting this complete control in the Commission, it is proposed to conserve the interests not only of prospective, but of existing, investors in the system, and the interests of consumers.

The suggestion that the phrase "or otherwise" may be deleted from sections 6, 7, 9 and 10 and a workable system of controls still be left is equally untenable. As above stated, 6 and 7 apply not only to the sale of securities but to the creation of the capital liability represented thereby, that is, the issuance of the securities. A security is never issued "by use of the mails or any means or instrumentality of interstate commerce." Deletion of the words "or otherwise" would, therefore, make these sections entirely inapplicable to the primary transaction sought to be regulated.

The phrase "or otherwise" does not express a separable theory of regulation which may be struck from the Act, but is rather a necessary part of the proposed regulatory structure. If this phrase be deleted, private sales of securities by holding or operating companies would not come within the purview of the Act. Probably even sales to underwriters for subsequent resale to the public would not be prohibited. (Compare the language of sec. 6(a) with 4(a) (3)).

The same is true of the regulation of the acquisition of securities or utility assets by sections 9 and 10. While preliminary negotiations leading up to such acquisitions frequently involve the use of the mails or facilities of commerce, the acquisitions themselves may be consummated within a single state without any such use. Consequently, the mere closing of the mails or channels of interstate commerce for this purpose would be entirely ineffective.

Clearly, therefore, elimination of the phrase "or otherwise" would not, as Judge Hand believed, leave "a workable system of controls"; the Act, as thus rewritten, would effect merely a change in the mode of procedure and not a change in the substance of operations. It is not within the judicial province to insert into the law the limitations suggested by Judge Hand. See Point I, pp. 50-54, *supra*, and authorities cited.

Moreover, we do not agree that if sections 6, 7, 9 and 10 were or could be confined to activities carried on by use of the facilities of commerce or of the mails, they would be valid.

We have shown in the preceding section of the brief that the activities sought to be regulated by these sections are

intrinsically intrastate in nature. While Congress undoubtedly has some regulatory power over the use of interstate facilities in the performance of intrastate activities, the use of such facilities does not constitute interstate commerce, nor does the use make the activity performed thereby interstate commerce.[1] There is a clear distinction between the power of Congress to regulate activities constituting or directly affecting interstate commerce and the power of Congress to regulate the use of the instrumentalities of commerce in the performance of intrastate activities. In the latter situation power to regulate the use exists only because such use may obstruct or burden the facilities of commerce or may cause them to be misused, as for the promotion of immorality or the "spread of any evil or harm to the people of other States from the State of origin".[2] Consequently this power extends only to the prevention of such obstruction, burden or misuse. Unless such obstruction, burden or misuse exists, Congress cannot regulate the activity performed by means of the use in accordance with any federal policy it sees fit to enact because the activity is not interstate commerce and such regulation, therefore, is not a regulation of interstate commerce (pp. 72-74, *supra*).

No contention can be made that the provisions of sections 6, 7, 9 and 10 are intended to prevent a misuse of the channels of interstate commerce. A security involving a scheme to defraud investors is harmful, inherently evil, and may, therefore, be excluded from the instrumental-

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[1] *N. Y. Life Ins. Co.* v. *Deer Lodge County, supra; United States Fidelity & Guaranty Company* v. *Kentucky, supra; Federal Baseball Club* v. *National League, supra; Hart* v. *B. F. Keith Vaudeville Exchange*, 12 F. (2d) 341 (C. C. A. 2d, 1926), cert. den. 273 U. S. 703; *Blumenstock Bros.* v. *Curtis Publishing Co., supra; Burco, Inc.* v. *Whitworth, supra.*

[2] *Brooks* v. *United States, supra*, at 436 (1925).

ities of commerce. As a corollary to this power, Congress may perhaps require, as it has done in the Securities Act of 1933, to which the defendants are equally subject with all other issuers of securities, that pertinent information as to every security to be issued for public offering through the channels of interstate commerce be made public so that, if fraudulent, it may be kept from those channels and the consummation of an evil thus be prevented. This was the holding of *Jones* v. *Securities & Exchange Commission*,[1] and *Securities & Exchange Commission* v. *Wickham*.[2]

This is not the type of regulation sought to be imposed by sections 6 and 7. Instead, these sections provide that, unless the Commission otherwise exercises its discretion, the securities to be sold must be of a particular type or issued for a particular purpose and that their issuance must constitute a reasonable business undertaking by the issuer and furnish a safe investment for the purchaser. There can be no valid contention that any security of a different type than those prescribed, or issued for a purpose other than those specified, is an inherently evil article to which Congress may deny the facilities of commerce.

Similarly, the acquisition through the facilities of commerce of securities or utility assets cannot be deemed a misuse of those facilities. Such acquisitions are normal and usual business activities in which there is no inherent evil. The most that can be said is that on occasions, holding and operating companies, like other companies, have paid too much for assets which they have acquired and that such payments have affected the interests of their

[1] 79 F. (2d) 617 (C. C. A. 2d, 1935), rev'd on other grounds, 298 U. S. 1 (1936).

[2] 12 F. Supp. 245 (D. Minn., 1935).

security holders. But, while Congress may prevent any company from distributing fraudulent securities or misleading statements in interstate commerce, it cannot prescribe to any company how it shall run its affairs (when interstate commerce is not involved or affected) because it believes that its business, so run, would be more beneficial to investors.

Except in the case of the Child Labor Act, held invalid in *Hammer* v. *Dagenhart, supra*, Congress has never, to our knowledge, attempted to regulate an industry by conditioning the right to use the facilities of commerce in performing the intrastate activities conducted by that industry upon compliance with federal control. The distinction between the power of Congress to regulate activities constituting and directly affecting interstate commerce and its power over the use of the facilities of commerce is fundamental to any realistic division between federal and state jurisdiction. All substantial business makes continuous and extensive use of the facilities of commerce, however intrastate in nature that business may be. Under the concept of federal power implicit in Judge Hand's opinion, Congress has the same regulatory power over such business as it has sought to exercise over holding companies. Acceptance of that concept by this Court would entail an entire redistribution of governmental power as it is today understood.

What has been stated with reference to the use of the facilities of commerce applies equally to the use of the mails. Congress may regulate the *use* within appropriate limits, but it cannot regulate the *user* under the guise of regulating the *use*.[1]

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[1] See *Burco, Inc.* v. *Whitworth, supra*, at 737; *Frost Trucking Co.* v. *R. R. Comm., supra*, at 591.

In *Lewis Publishing Co.* v. *Morgan*,[1] this Court made the following significant observation concerning the contention of the Government that the plenary power of Congress over the mails could be exercised through the mechanism of conditional exclusion or classification to impose any regulatory measures it saw fit to enact:

> "Finally, because there has developed no necessity of passing on the question, we do not wish *even by the remotest implication* to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition embodied in the proposition of the Government which we have previously stated."

A similar indication of the Court's view may be deduced from its statement in *Ex Parte Jackson*:[2]

> "The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. *The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.* * * * "
>
> "In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals."

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[1] 229 U. S. 288 (1913).
[2] 96 U. S. 727, 732 (1877).

Perhaps the best discussion of this entire subject is contained in *Cushman, The National Police Power.*[1] After rejecting the proposition that conformity to general police regulations may be made the price of enjoying the mail facilities, the author concludes:

> "It seems from the foregoing analysis that the postal power is one which may be wielded very effectively by Congress for the police purposes. That power extends to the adequate protection of the postal service from injury; it extends to the protection of the public from the various dangerous or harmful uses to which mail privileges may be put; *it extends to the promotion of positive public policies related to the broad purposes for which the postal system exists;* it extends to the withholding of postal privileges as a means of inducing persons to conform to reasonable requirements and regulations incidental to the privileges of the mails. *But as soon as Congress begins to use its postal power as a lever or a club to compel people to do things or refrain from doing things which have no real or intimate relation to the postal system or any of the larger purposes which may properly be promoted by it, the line of constitutionality has been crossed and Congress has exceeded its powers. In exercising a police power under the postal clause, as under the powers to tax and to regulate commerce, the ultimate test of constitutionality must be, not whether the police regulation established is necessary or desirable for the protection of the national health, safety, or morals, but whether the evil which Congress is combatting has any real and practical connection with the particular delegated power which Congress is employing.* Any other construction of the authority of Congress to exercise a police power would destroy the whole force

[1] (1920) 4 Minn. L. Rev. 402.

> of the doctrine of delegated national powers and allow Congress by a process of the most obvious indirection to deal with problems of purely local welfare."[1]

No more need be said. The Constitution gives Congress power "to establish post-offices and post-roads". It does not give Congress power "to provide for the control and regulation of public-utility holding companies". To transmute the one into the other requires a magic greater than any form of argument can supply.

(2) The Act invades the reserved powers of the states in violation of the Tenth Amendment.

It follows as a corollary from the discussion under the preceding heading, that the Act, because not falling within any of the delegated powers of Congress, directly invades the powers reserved to the states under the Tenth Amendment. But affirmatively stated as a distinct proposition, the Act is an attempted exercise of an assumed power to legislate for the general welfare, on the assumption that the states either cannot act, or have not acted effectively.

The declared purpose of the Act to regulate matters beyond the sphere of federal control because state regulation is inadequate may best be characterized in the language of this Court in *Carter* v. *Carter Coal Company, supra:*[2]

> "The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the

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[1] See also Rogers, The Postal Power of Congress, "Studies in Historical and Political Science, Vol. XXXIV (1916) of The John Hopkins University, Chap. VII. This is reprinted, with some changes, from Rogers, *The Extension of Federal Control Through the Regulation of the Mails* (1913) 27 HARV. L. REV. 27.

[2] 298 U. S. at 291.

> nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court" (Quoting *Kansas* v. *Colorado*, 206 U. S. 46, 89, 90 (1907)).

It requires no citation of authority to support the statement that the charter powers of corporations to own and vote stock in other corporations, acquire property and transact business, issue securities, fix priorities, preferences, voting power and other rights of security holders, borrow money, extend credit or indemnity, pay dividends, retire or redeem securities, sell securities held for investment or other assets, and solicit proxies or consents for meetings of stockholders, are all matters regulated by the general corporation laws of the states of incorporation.

Likewise, the migration of corporations to other states to transact business or acquire property subjects them to the laws of such states governing foreign corporations. The states may exclude such corporations entirely from their borders, or prescribe the laws to which they will be subject and the regulations which may be imposed upon them,[1] so long as interstate commerce is not thereby burdened or obstructed, or any of the constitutional rights of such corporations violated.[2]

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[1] *Phillips Petroleum Company* v. *Jenkins*, 297 U. S. 629 (1936); *Railway Express Company* v. *Virginia*, 282 U. S. 440 (1930); *Hemphill* v. *Orloff*, 277 U. S. 537 (1928); *New York Life Insurance Company* v. *Cravens*, 178 U. S. 389 (1900); *Hooper* v. *California*, 155 U. S. 648 (1895); *Crutcher* v. *Kentucky*, 141 U. S. 47 (1891).

[2] *Williams* v. *Standard Oil Company, supra; Hanover Insurance Company* v. *Harding*, 272 U. S. 494 (1926); *Western Union Telegraph Company* v. *Kansas, supra; Allgeyer* v. *Louisiana*, 165 U. S. 578 (1897).

In order to show the many points of conflict between the provisions of the Act and presently existing regulatory statutes of the several states applicable to public utility companies operating within their borders, and holding companies of such companies, we supply as Appendix B a chart showing generally the subjects covered by state statutes. From this it will be seen that 31 of the states regulate the issuance and sale of securities of operating public utility companies, 28 regulate mergers, consolidations and acquisition of additional properties, 24 regulate the sale of assets, 11 regulate payment of dividends, 38 regulate the form of accounts, 16 regulate banking transactions between operating companies and holding companies or other affiliated interests, 21 regulate all contracts between such companies, and 21 regulate the acquisition of stocks of operating public utilities by holding companies.

This Act seeks to vest in a federal commission the power to control all of these things without reference, except in particular instances, to the laws of the several states or administrative regulations thereunder, and in two instances expressly authorizes such state regulations to be ignored.[1]

The recent decision of the Supreme Court in *Hopkins Savings Association* v. *Cleary*,[2] is conclusive in principle

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[1] Section 7 relating to approval of the issuance or sale of securities and section 8 relating to operation of electric and gas companies in the same territory, contain provisions requiring approval by states. Section 10 relating to approval of acquisition of securities or assets contains similar provisions *except where compliance with state laws would be detrimental to the carrying out of section 11.* In other words, in the latter event the state statute will be disregarded. Section 15 provides that when the Commission has prescribed a form of accounts for any companies subject to its jurisdiction, *it shall be unlawful to keep accounts in any other form.*

[2] 296 U. S. 315 (1935). See also *Chicago Title and Trust Co.* v. *Forty-One Thirty-Six Wilcox Bldg. Corp.*, Oct. Term—1937, Nos. 23-24.

that such an attempted exercise of jurisdiction invades the powers reserved to the states. In that case a Wisconsin Building and Loan Association, strictly regulated by the laws of Wisconsin, had sought to convert itself into a Federal Building and Loan Association pursuant to an Act of Congress purporting to permit such a change upon a vote of 51% of the stockholders. The State of Wisconsin brought suit to annul the corporate proceedings and to compel the directors and officers to continue the business or liquidate in accordance with the Wisconsin law. In affirming a decision of the state court so decreeing, this Court, by Mr. Justice Cardozo, said:

> "Second: The Home Owners' Loan Act, to the extent that it permits the conversion of state associations into federal ones in contravention of the laws of the place of their creation, is an unconstitutional encroachment upon the reserved powers of the states. United States Constitution, Amendment X.
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> "A corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi-public, though for other purposes of classification the corporation is described as private. * * * How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred."

The many points of conflict between the Act and the powers of the states constitute a clear invasion of the rights reserved to the states under the Tenth Amendment.

(3) The Act unlawfully delegates legislative power to the Commission.

The objective of the Act is nothing but the general welfare—the national public interest, and the protection of investors and consumers. These are entrusted to the Commission for its conservation. Its conception thereof is controlling on all its actions in (a) the selection of the persons to be regulated, and (b) the matters to be regulated and the manner of their regulation.

(a) *Selection of persons.* The discretion granted the Commission by section 2(a)(7) to exclude or include holding companies is predicated upon its own conception of whether the company exercises such control of its subsidiaries as to require inclusion or permit exclusion in order to protect the public interest or that of investors or consumers. Similar discretion is granted by 3 to exempt, or not to exempt, holding companies of specified classes (already commented on, p. 31, *supra*), and unlimited discretion is granted by 3(d) to exempt any class of subsidiaries, conditionally or unconditionally, from any or all of the obligations, duties or liabilities of subsidiaries. There is, in fact, no requirement of regulation which the Commission may not dispense with in its own discretion, except with respect to holding companies such as the principal defendants here in whose systems there is a diversity of states of incorporation and operations.

Under the discretion thus committed to it, upon the enforced registration of defendant holding companies required by the decree the Commission may regulate or not, as it will, the interstate utility subsidiaries of defendants or their intrastate subsidiaries, or both (sec. 3(d)). It may regulate or not, as it will, the various real estate

companies, water companies, street railway companies, bus companies, heating companies, limestone companies and sulphur companies, which, by the record, are shown to be direct or indirect subsidiaries of the various holding company defendants.[1]

As illustrative of the breadth of the potential regulatory control over all industry inherent in this Act, we remark that, as of December 31, 1936, there were filed with the Commission some six hundred applications for exemption from the Act, by such companies as United States Steel Corporation, Union Pacific Railroad Company, Standard Oil Company of Indiana, Consolidated Coal Company, Inc., Irving Trust Company, Remington Arms Company, E. I. DuPont de Nemours & Company, Penn Water Company, Superior Portland Cement Company, Inc., Curtis Leather Company, Oxford Paper Company, Reno Bridge Company and numerous other banks, railroads, investment companies, utility companies and non-utility companies.[2]

By the terms of the Act, the determination of these applications must depend upon the Commission's conception of the national public interest and the welfare of investors and consumers as applied to these companies. Can any such comprehensive delegation of authority to regulate or not to regulate be entrusted to a federal commission?

(b) *Selection of matters to be regulated and the manner of their regulation.* With respect to all of the subsidiary companies, the discretion entrusted to the Commission is to regulate, or exempt from regulation, any class of subsidiaries "under any provision or provisions of this title".

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[1] See p. 13, *supra*, citing R. IV, 760-762, 770-781, 792-809, 827-837.

[2] Securities and Exchange Commission, Compilation of Releases under Public Utility Holding Company Act of 1935, to and including December 31, 1936, pages 7-19.

Thus, security issues, acquisitions of property, loans, redemptions of securities, payments of dividends, and the other specified transactions may be regulated or not, as the Commission will. But even as to companies not exempt nor subject to exemption, many of their activities are regulated only if the Commission issues rules, regulations or orders governing them, and the Commission may issue such rules, regulations or orders, or not, solely in its discretion, and this discretion extends to determination of when they shall be issued, amended or rescinded, and what they shall contain.[1] "For the purpose of its rules, regulations, or orders the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters."[2]

Where apparent standards are erected for the Commission's guidance, as, for example, in the control of the issuance of securities, they are no sooner prescribed than they are nullified by permitting the Commission to disapprove transactions, otherwise meeting such standards, if the Commission believes that the transactions "impose an unreasonable financial burden * * * and are not necessary or appropriate in the public interest or for the protection of investors or consumers."[3]

The ultimate objective of the Act, the simplifying of holding company systems (sec. 11), is likewise expressed in a grant of such unlimited discretion as to the rearrangement of the public utility map of the United States that the Commission may preserve or destroy most public utility holding company systems at will, except that those which, like many of the major defendants here, have chosen

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[1] See, particularly, the provisions of sections 12 and 20(a).
[2] Section 20(c).
[3] Section 7(c) (2).

diversity of geographical location as a principle for their establishment, must necessarily be destroyed.

(c) *There is no adequate standard to guide the Commission in the exercise of its discretion.* The guide to the Commission's action in the matters entrusted to its control is that such action be "necessary or appropriate in the public interest or for the protection of investors or consumers". The phrase is without meaning when applied indiscriminately to such varying problems as the type of securities to be issued, the sales prices thereof, their voting rights, their purchase or redemption, the dividends to be paid thereon, intercompany loans, the acquisition of assets, the price to be paid therefor, the solicitation of proxies, the appropriate size of a public utility system to secure efficiency of management, and the selection of any additional matter to be regulated in the public interest.

Although the "public interest" has been used as a standard before, in every case the context of the statute supplied definite criteria by which the public interest was to be gauged. Either the policy declared by Congress—as in the Transportation and Interstate Commerce Act cases[1]—or the nature of the business regulated by the statute and its specified objectives as related to a distinct federal power—as in the Radio Act of 1927[2]—gave this otherwise unlimited standard a definitely ascertainable meaning. These cases are distinguished in *Schechter Corp.* v. *United States, supra,* where the whole subject is exhaustively re-

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[1] *New York Central Securities Corp.* v. *United States,* 287 U. S. 12 (1932); *Avent* v. *United States,* 266 U. S. 127 (1924); *Chesapeake & Ohio Ry.* v. *United States,* 283 U. S. 35 (1931); *Texas & Pacific Ry. Co.* v. *Gulf etc. Ry. Co.,* 270 U. S. 266 (1926); *Interstate Commerce Commission* v. *Goodrich Transit Co., supra.*

[2] *Federal Radio Commission* v. *Nelson Brothers Mortgage Co.,* 289 U. S. 266, 285 (1933).

viewed. Decision is controlled by the principles declared in that case and in *Panama Refining Co.* v. *Ryan.*[1]

(4) The Act offends against the Fifth Amendment.

The control provisions of the Act transfer to a federal agency the direction and management of the private business affairs of the defendants in their most essential particulars. It does not establish standards of conduct to be enforced by the Commission nor is Commission control predicated upon misconduct or bad faith either in past or contemplated transactions. To reach its declared objectives, the Act passes the limits of regulation and assumes the management of holding companies and their subsidiaries.

Sections 6-10 and 12. Under sections 9 and 10, the Commission may not only approve or disapprove acquisitions of property and securities contemplated by the companies subject to its jurisdiction; it may prescribe, as a condition of approval, the price to be paid and, with respect to securities, may require additional amounts to be purchased. Similarly, under sections 6 and 7, regulation of the issuance of securities is not limited to such as will insure that the securities are not fraudulent or otherwise harmful. The Act substitutes the judgment of the Commission as to the economic wisdom of the issuance for that of the board of directors, by allowing the Commission to disapprove any issuance deemed by it to be "not necessary or appropriate to the operation of the business", or "not reasonably adapted" to its security structure or earning power. The controls of section 12 with respect to inter-company loans, dividends, security redemptions, sales of securities and

[1] 293 U. S. 388 (1935).

assets, proxies and miscellaneous transactions, are equally destructive of private management and unlimited in their transfer of managerial functions to the Commission.

In view of its declared objectives and the inter-relation of its parts, the essential concept of this Act is that upon registration a holding company immediately becomes a ward of the Commission, having no more freedom of action than a declared bankrupt with its assets impounded for the benefit of investors and consumers as their interests may appear. Its assets and liabilities become frozen; it may engage in no new venture, acquire no interest in any business, purchase no utility assets, dispose of no utility holdings, issue no securities, retire or redeem no securities, make no loans or borrowings, pay no dividends, nor do anything which may affect the process of its dissolution or reorganization, except with the approval of the Commission, and consistent with the facilitation of that process. The fact that some companies, in the discretion of the Commission, may survive the purgatorial processes of section 11 by submitting in perpetuity to these controls does not affect this underlying concept of the Act.

This entire system, whether regarded as a whole or separately in its parts, is not regulation in the public interest. It is public management of private interests, utterly lacking in due process.[1]

The fact that the companies sought to be regulated are public utility operating and holding companies does not give the government any greater right to regulate their private affairs than those of any other private corpora-

[1] See *Missouri ex rel. S. W. Bell Tel. Co.* v. *Public Service Commission*, 262 U. S. 276, 289 (1923); *cf. Hopkins Savings Association* v. *Cleary, supra.*

tions. As this Court stated in *Treigle* v. *Acme Homestead Association*:[1]

> "The Appellee bases its entire argument in support of the challenged enactment upon the proposition that, as building and loan associations are incorporated for a quasi-public purpose, the state has a peculiar interest and a concomitant power of supervision and regulation to prevent injury and loss to their members * * * We recognize that these associations, like banks and public service companies, are subject to a degree of regulation which would be unnecessary and unreasonable in the case of a purely private corporation. But laws touching building and loan associations, *like those affecting banks or utility companies,* must be confined to purposes reasonably connected with the public interest as distinguished from purely private rights. *The legislature has no greater power to interfere with the private contracts of such corporations, or the vested rights of their stockholders as such,* under the pretext of public necessity, than it would have to attempt the same ends in the case of a private corporation."

Even the federal government in the regulation of railroads may not disregard private property interests and exercise, under the guise of regulation, the functions of management.[2]

Section 13. This section contains direct prohibitions equally destructive of private property. As applied to the case at bar, it takes from Bond and Share the profit it

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[1] 297 U. S. 189, 197 (1936).

[2] *Interstate Commerce Commission* v. *Chicago Great Western Railway Company,* 209 U. S. 108 (1908); *Chicago, Milwaukee and St. Paul R. R. Co.* v. *Wisconsin,* 238 U. S. 491 (1915); *Great Northern Railway Company* v. *Minnesota,* 238 U. S. 340 (1915).

derives from Ebasco's business and transfers it gratuitously to the customers of the operating companies and to the holders of those companies' securities. Even if Congress had power to regulate not only the rendition of services but the profit to be derived therefrom, it could not arbitrarily exercise such power so as to destroy the profit entirely. *Adams* v. *Tanner*;[1] *Liggett* v. *Baldridge*.[2]

In the *Adams* case, *supra*, a state law forbidding employment agents from receiving fees from the workers for whom they find employment was held invalid, even though such agents were not forbidden to collect fees from the employers. This Court, holding that "the statute is one of prohibition, not regulation" stated:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way."

Again, in the *Liggett* case, *supra*, this Court stated that a state cannot "under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable or unnecessary restrictions upon them."

Section 13(b) is condemned by the rule of the *Adams* and *Liggett* cases. Although the actual rendition of services is not prohibited, any more than the placing of workers by the agent in the *Adams* case was prohibited, the *business* of rendition of services, which depends upon an opportunity for profit, is prohibited. Outlawing profits from busi-

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[1] 244 U. S. 590 (1917).
[2] 278 U. S. 105 (1928).

ness activities is as much a prohibition of business as outlawing the activities themselves.

A rule issued by the Commission (Rule 13-32) which allows compensation for the capital necessarily employed in the performance of the services does not (even if it could) change the situation. The price which must be paid for money is as much a cost as the price which must be paid for goods or the salaries which must be paid to employees. The rule, therefore, does not permit Ebasco to make any profit, and the question under the rule, as well as under the Act, is whether a company, such as Ebasco, can be forbidden the right to make a profit.[1]

Even in cases involving rates fixed for public utilities, where unlike the case of a service business a large capital investment is involved,[2] this Court has consistently recognized that a rate is confiscatory which requires the utility to operate at cost, or for a return which is no greater than current interest on mere investment. *Northern Pacific Ry.* v. *North Dakota*,[3] *Bluefield Co.* v. *Public Service Commission*;[4] *United Railways* v. *West*;[5] *Wabash Valley Elec. Co.* v. *Young*.[6] In the only two cases which we have been able

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[1] That this interpretation of the rule is the one adopted by the Commission itself appears from Form U-13-60 promulgated by the Commission for the annual reports of mutual and subsidiary service companies. In Items 200, 205, 210 and 220, in reference to services rendered to non-affiliates at other than cost, the Commission requires income to be broken down into three categories: (a) Recovery of expenses; (b) Compensation for the use of capital; and (c) Profit or other component.

[2] This Court has recognized that the question of the proper rate for companies having a large capital investment and that for companies without such an investment is entirely different. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 49 (1936).

[3] 236 U. S. 585 (1915).

[4] 262 U. S. 679 (1923).

[5] 280 U. S. 234 (1930).

[6] 287 U. S. 488 (1933).

to find in which rates for services performed by companies not having a large capital investment were upheld by this Court, the rates permitted a profit over and above the cost of performing the services. *Tagg Bros. & Moorhead* v. *United States;*[1] *Acker* v. *United States.*[2]

The charge made by the Act (sec. 1(b)(2)) is that subsidiaries are subjected to excessive charges for services. The statement in Judge Mack's opinion that Congress found that service contracts "are tainted with fraud"[3] is clearly erroneous. No such finding was made nor could be sustained as a matter of law. That very question was involved in *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Commission*[4] with respect to disallowance by the Missouri Commission of fees paid by the Telephone Company to American Telephone & Telegraph Company for rents of apparatus and for "services under the customary form of contract between the latter company and subsidiaries". The Court said "There is nothing to indicate bad faith * * *. It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership. * * *" This decision has been repeatedly cited and followed.[5] It has never been reversed or modified.

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[1] 280 U. S. 420 (1930).

[2] 298 U. S. 426 (1936).

[3] R. VIII, 2202.

[4] 262 U. S. 276, 288-289 (1923).

[5] *Fouston* v. *Southwestern Bell Tel. Co.*, 259 U. S. 318 (1922); *Illinois Bell Tel. Co.* v. *Gilbert*, 3 F. Supp. 595 (N. D. Ill. 1933), rev'd on other grounds in *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151 (1934); *Pacific Tel. & Tel. Co.* v. *Whitcomb*, 12 F. (2d) 279, 284, 285 (W. D. Wash. 1926), aff'd, *Denney* v. *Pacific Tel. &*

With respect to the allowance of servicing fees as a proper basis for rates, this Court has held in *Smith* v. *Illinois Bell Telephone Company, supra,* that the cost to the company rendering services is a factor to be ascertained, and in the case of companies operating partly interstate and partly intrastate, the expense item is to be allocated between the interstate and intrastate services of the utility. In this case it appeared that the American Telephone & Telegraph Company owned substantially all the capital stock of the Illinois Company, and presumably in determining whether the rates were confiscatory or not, the relationship between the cost of the services and the fees charged would be closely scrutinized, although there is no suggestion that all profit should be eliminated.

American Gas which owns all or substantially all of the stock of its subsidiaries, renders services at cost,[1] and allocates the charges on what *prima facie* appears to be a reasonable basis. But in the case of Ebasco and Bond and Share, the situation is different. Ebasco owns no securities of any of the serviced companies or of any holding companies, and Bond and Share owns only a fractional interest

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Tel. Co., 276 U. S. 97 (1928); *Southern Bell Tel. & Tel. Co.* v. *Railroad Commission,* 5 F. (2d) 77, 86, 97 (E. D. S. C. 1925); *Northwestern Bell Tel. Co.* v. *Spillman,* 6 F. (2d) 663 (D. C. Neb. 1925); *Indiana Bell Tel. Co.* v. *Public Service Commission,* 300 Fed. 190 (D. Ind. 1924); *State* v. *Southwestern Bell Tel. Co.,* 115 Kans. 236, 223 Pac. 771 (1924); *Southern Bell Tel. & Tel. Co.* v. *Railroad Commissioners,* 299 Fed. 615 (E. D. S. C. 1923); *Chesapeake & Potomac Tel. Co.* v. *Whitman,* 3 F. (2d) 938 (D. C. Md. 1925); *Michigan Bell Tel. Co.* v. *Odell,* 45 F. (2d) 180 (E. D. Mich. 1930); *New York Tel. Co.* v. *Prendergast,* 36 F. (2d) 54 (S. D. N. Y. 1929).

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[1] R. III, 459-461. But see note 2, p. 12, *supra.*

in the stocks of its subsidiary holding companies which in turn own directly or through sub-holding companies the stocks of operating companies. There would seem to be no justification for allowing Ebasco no more than the cost of the service rendered to the operating companies even for rate-making purposes.

Undoubtedly the charges should be reasonable. Empowering a commission to prescribe and allow only reasonable charges would be an appropriate means of meeting the specification of the Act that such charges are frequently excessive. Presumably, however, the determination of such reasonable charges is a matter for state commissions with respect to the regulation of intrastate utilities, and for a federal agency such, for example, as the Power Commission, in the regulation of interstate utilities and rates for their services.[1]

Such a provision for determination of reasonable charges for these services would enable the appropriate commission to take into consideration all varying factors of the individual cases, such as the stock ownership relation of the companies, the presence or absence of common directors or officers, the scope and value of the services, and their necessity in the case of the individual company. The Federal Trade Commission recognized this principle in its report. Its concrete recommendations were that the service contract should be subject to the public service commission's scrutiny and approval before it may become legally

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[1] See *Smith* v. *Illinois Bell Telephone Co., supra.* That state agencies have full power in this situation to secure from the holding company all the information required for such regulation is the holding of *Natural Gas Pipeline Company* v. *Slattery*, No. 230, Oct. Term—1937. See also *Western Distributing Co.* v. *Public Service Commission, supra.*

effective or valid[1] and it stated, "The fact that a holding company made a profit upon servicing is not conclusive evidence of lack of advantage in the transaction. The real measure is whether the work was needed and whether the operating company could have performed or obtained it at less cost."[2]

Section 11. This section provides for involuntary reorganization of solvent companies. It is perhaps the most arbitrary and vindictive provision which has been enacted into law since reconstruction days. Geographical diversity of operating companies in a holding company system, if not of positive value as defendants believe, has no relation to any federal objective. Yet, the Act directs the Commission to require all the major holding company defendants (with the possible exception of American Gas) to reorganize or dissolve, simply because of the existence of such geographical diversity in their systems. Bond and Share may in addition be required to dispose of its large foreign investments (R. II, 285) as a condition of retaining any of its domestic holdings. This surely is an unprecedented invasion of constitutional rights. *Liggett* v. *Baldridge, supra.*

Equally unwarranted is the duty imposed upon the Commission to require that each company in the holding company system take such steps as the Commission finds necessary to insure that its corporate structure or continued existence "does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among the security holders" of such system

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[1] F. T. C. Report, Pt. 72-A, p. 665.
[2] *Id.*, p. 835.

(sec. 11 (b) (2)). Corporate charters and indentures create vested rights in security holders *inter sese* which cannot be divested without the consent of all the security holders affected. To interfere with these rights is a violation of the Fifth Amendment.[1]

The same considerations apply to the procedural provisions of section 11. A solvent holding company may be thrown into a reorganization proceeding in the federal courts and a trustee appointed for its assets for the purpose of carrying out an order of the Commission simplifying or eliminating the holding company in accordance with 11 (b). The company is given no opportunity, and has no right, to work out a voluntary reorganization to confine its properties to a single integrated system. It must dispose of such properties as the Commission may order. Since no prudent person would buy the securities in such volume as to become a holding company without approval of the Commission, for practical purposes the Commission can order the sale, select the buyer and fix the price. Any reorganization plan that is presented must receive the approval of the Commission, and the Commission has complete authority to prevent, by failure to approve, any plan that may accomplish the objectives of the Act, although it bears the approval of both the security holders and the court. No regulatory act, so far as we are aware, has similar or analogous provisions.

Clearly, the control system of this Act is totally irreconcilable with the protection which the Fifth Amendment was designed to afford to private rights and property.

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[1] *Treigle* v. *Acme Homestead Ass'n, supra; Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 357 (1935); *Pennsylvania Coal Company* v. *Mahon*, 260 U. S. 393, 416 (1922); *Louisville Bank* v. *Radford*, 295 U. S. 555 (1935).

V.

The District Court erred in dismissing the counterclaim and cross-bill.

If this Court agrees with the contentions advanced in the preceding pages and the injunction decree granted by the District Court in the main case is, therefore, reversed, the right of defendants to maintain their counterclaim and cross-bill is academic. If, on the other hand, the Court should sustain the granting of the injunction in the main case, it becomes necessary to determine the right of defendants to relief under the cross-bill.

(1) The right to an injunction on the cross-bill.

The provisions of the Act applicable to registered holding companies now irreparably injure the defendants, even as unregistered holding companies under no injunctive compulsion to register, by placing a cloud upon their entire business and making it impossible for them to plan for the future. They must necessarily abandon the normal development of their business in favor of temporary expedients designed to tide them over the period of uncertainty with respect to the validity of the Act. *North American Co.* v. *Landis* in the Court of Appeals for the District of Columbia.[1]

The defendants, therefore, could have maintained an original bill to enjoin enforcement of the Act.[2] Having

[1] 85 F. (2d) 398 (App. D. C. 1936). The Court stated with respect to this Act: "That the rights of the plaintiffs in the present cases would suffer by reason of the stay granted is apparent, *since the very existence of the Act, whether they register under it or not, must of necessity affect materially the conduct of their business during the pendency of these suits.*"

[2] *Carter* v. *Carter Coal Co., supra.*

been directed to register in the main suit, equitable relief becomes indispensable. The decree subjects the defendants forthwith to the control provisions of the Act, which will then injure them not only through the presently existing danger of future consequences, but through the immediate and direct restraints at once applied to them. That defendants might escape the damage caused by these restraints by disobeying the Act at the risk of having innumerable severe penalties under section 29 inflicted on themselves, their officers and directors, should their belief that the Act is unconstitutional prove unfounded, is not a bar to their right to relief. *Panama Refining Co.* v. *Ryan, supra; Ex parte Young;*[1] *Terrace* v. *Thompson.*[2]

The following provisions of the Act by their terms affect the business of the defendants, immediately upon the registration of the holding companies:

1. Section 13 makes it unlawful for Ebasco Services Incorporated, Bond and Share's wholly owned subsidiary, to perform any service, sales or construction contract with any associate company except upon conditions which have been affirmatively prescribed by the Commission, requiring the services to domestic associate companies to be rendered at cost.

2. Section 11 throws such a cloud upon the very existence of Bond and Share and the major holding company defendants that their credit, their ability to function successfully and economically and to expand

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[1] 209 U. S. 123, 163-164 (1908).

[2] 263 U. S. 197, 215-216 (1923).

and build up their business in the ordinary manner is even more seriously impaired than it was prior to registration. By the provisions of this section, the Commission is not merely authorized but required, as soon as practicable after January 1, 1938, to compel the reorganization of Bond and Share, American Company, Electric Company, and National Company. The application of the section to those defendants is not problematical but certain. Their properties were acquired on the economic principle of "territorial diversification of the operating companies whose controlling common stocks were owned by any one holding company, in order that any benefit of diversity of climate and industrial factors affecting both the quantity and continuity of gross earnings might be obtained" (R. II, 281)—a principle the reverse of that established by the Act. None of these companies may conceivably bring its present holdings within a single integrated public utility system as defined by section 2 (a)(29). The holdings of American Gas and some of the other defendants may be so preserved or may not within the discretionary construction and application of 11 by the Commission. The credit and standing of operating subsidiaries must similarly be impaired when it is proposed to destroy their existing holding company connections without any determination as to what shall take their place.

3. Under sections 6 and 7, neither the registered holding company nor any of its subsidiaries may issue their own securities or sell them without application to and approval by the Commission and the Commission must approve the wisdom of the issuance of the securities. By 9 and 10 application must be made for approval by the Commission of any acquisition of securities or utility assets, or any other interest in any business, by a holding company or its sub-

sidiaries. The acquisition must be in line with the ultimate objective of the Act, that of creating integrated public utility systems. All acquisitions by the major defendants would thus appear to be prohibited until the effect of 11 on their present systems shall be determined. It is no help to the defendants to say that the Commission may approve any issue of securities or acquisition of assets and that they should first apply for such approval and then seek court protection if it be denied. They should not be forced to bear the expense of asking for such approval if these sections are invalid. The delay entailed by such proceedings may cause the opportunity to finance or acquire assets to vanish, with resulting damage impossible to measure in money. Further, as a practical matter it would be impossible to determine the constitutionality of the sections under facts more specific than those set forth in this case, to wit, a general intention to issue securities or acquire assets when a favorable opportunity arises (R. VIII, 2245-2248). If an injunction proceeding should be brought against the Commission enjoining the enforcement of these sections with respect to a particular transaction, by the time the case can be finally adjudicated the opportunity to issue the securities or acquire the assets under the conditions stated in the application to the Commission and the complaint will have vanished or the proposition will have become so unattractive to the company that the case will have become moot.

4. Immediately upon registration, every holding company must conform to the system of accounts promulgated by the Commission (sec. 15), must conform to the Commission's rules concerning solicitation of proxies (12), may not make certain acquisitions of electric and gas utilities serving the same territory without the approval of the State Commission involved,

even though state law does not require such State Commission approval (8), and may not, without the approval of the Commission, do any of the other things conditioned upon securing such approval by the remaining provisions of the Act. For a summary of the provisions now implemented by rules and regulations of the Commission, see page 122, *infra*.

These are not fancied or hypothetical injuries; they are direct invasions of defendants' rights which are certain to ensue if defendants be ordered to register and unless injunctive relief be granted. There is nothing defendants can do to avoid the incidence of these restrictions upon their business;[1] there is nothing the cross-defendants can do to avoid applying these restrictions to defendants, short of nullifying the Act of Congress which they are engaged in administering and which it is their sworn duty to enforce.[2]

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[1] The inconsistency of the Government's position is shown by the fact that, for purposes of the main suit, the Government contends that the court must assume that defendants or their subsidiaries will continue to render services in violation of section 4(a) (2), to issue securities in violation of 4(a) (3), and to acquire securities and utility assets in violation of 4(a) (4), but, when attacking the cross-bill, it argues that the court cannot assume the defendants or their subsidiaries will continue to engage in these very activities.

[2] The Government seems to urge that the Commission is required by the Act to enforce only such of its provisions as, in its untrammeled discretion, it deems wise. That is to say, Congress has left it to the Commission to say what is the law and what is and is not to be applied. Such a statute would, of course, be unconstitutional. *Panama Refining Co.* v. *Ryan, supra; U. S. Sugar Equalization Board* v. *P. DeRonde & Co.*, 7 F. (2d) 981 (C. C. A. 3d, 1925). And, if the Act is to be construed as providing that only so much of it is to be enforced as the Commission deems constitutional, it would be void for uncertainty under the doctrine of *Smith* v. *Cahoon, supra*.

These practical considerations are clearly not satisfied by saying, as the District Court has said in its decree, that the questions raised by these sections may be determined later. The registered holding company and its subsidiaries may conduct business without securing Commission approval only at the risk of cumulative penalties imposed by section 29 or of delay caused by constant appeals to the courts, which would make impractical the conduct of any business. Should the directors decide to run the penal risk of violating the Act as unconstitutional, they would find no responsible person who would assume the business risk of dealing with them under contracts declared to be void by 26.

The decision below that the defendants may not contest the validity of these regulatory provisions because they apply only to registered holding companies, is, we submit, pure formalism. The test of the right to injunction is not the immediate applicability of the statute, but present damage, whether caused by a statute now applicable or one which will become applicable in a short time.[1] If the defendants registered today by filing a slip of paper in Washington, they could bring an injunction suit tomorrow to enjoin enforcement of at least some of the regulatory provisions. To state, as did Judge Mack and Judge Manton (R. VIII, 2210 *et seq.*, 2332 *et seq.*), that under these circumstances the defendants are not now affected by such regulatory provisions, when the decree orders them in effect to register, is unrealistic, and contrary to

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[1] *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Euclid* v. *Ambler Co.*, 272 U. S. 365 (1926); *Carter* v. *Carter Coal Co.*, *supra*; *City Bank Co.* v. *Schnader*, 291 U. S. 24, 34 (1934).

the direct decision of this Court in *City Bank Co.* v. *Schnader*.[1]

In substance and effect the Act is exactly the same as a statute which defines a holding company as one engaging in any of the activities enumerated in section 4(a), and then proceeds to regulate holding companies as thus defined, or the same as a statute which states that a holding company doing any of the acts enumerated in 4(a) shall be deemed to be a registered holding company. Had the Act been drawn in either of these forms instead of its present form, its effect upon the business of the defendants would be exactly the same. The decision reached by the District Court, is, therefore, based solely upon the peculiar form of the Act.

Similarly, the arguments of the cross-defendants below are without merit. It is contended that the cross-bill seeks "an advisory opinion as to the rights and duties of the defendants under hypothetical circumstances"—in other words, that the court cannot now foresee what activities defendants will be engaged in when they register, and thus how the provisions of the Act will impinge upon them, and that it similarly cannot foresee how the plaintiff will administer the Act. This is pure sophistry. How the defendants now carry on their activities and how the Act impinges upon such activities is disclosed by a stipulated record of approximately 2,000 pages. Even if defendants could reorganize to avoid the incidence of the Act, which

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[1] 291 U. S. 24 (1934). The Court stated at page 34: "Moreover, no purpose would be served by dismissing the bill, if, as we hold, the moment the proposed assessment is made, another suit may be instituted in the Federal Courts."

they cannot do,[1] the compulsion to do so placed upon them by an invalid statute is sufficient ground for an injunction. *Ex parte Young, supra.* Sections 11 and 13 and all the other mandatory provisions of the Act cannot fail to affect them directly if the decree ordering them to register is affirmed. And since the cross-bill proceeds on the theory that the Act cannot be constitutionally administered, it is validly predicated even though all the provisions of the Act have not yet been implemented by administrative action. *Pennsylvania* v. *West Virginia;*[2] *Euclid* v. *Ambler Co.*[3]

Ashwander v. *Tennessee Valley Authority,*[4] which was principally relied upon by the cross-defendants below in this connection, is inapplicable. The injury or damage alleged there which this Court refused to consider depended entirely on what the Authority did within the powers granted to it; there was no requirement of the statute that it should carry out those powers in a manner injurious to plaintiff and no proof that it would surely do so.

The further argument relied upon by the cross-defendants below—that no justiciable controversy is raised on the cross-bill because the defendants have not threatened to

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[1] The Government suggested below that "even a company of the size and scope of Bond and Share may avoid the necessity of divesting itself of any of its assets by becoming a true investment company and giving up its control over utility operating companies." Such voluntary surrender of voting rights, if it may not be constitutionally required, would be a flagrant violation of the fiduciary duties of the board of directors under state laws unless unanimous consent of stockholders could be obtained, which is obviously impossible here.

[2] 262 U. S. 553, 592 (1923).

[3] 272 U. S. 365, 386 (1926).

[4] 297 U. S. 288, 324-325 (1936).

enforce the Act—is similarly unfounded. This Court has consistently held that where a statute by its terms so circumscribes the conduct of a business as to make its normal functioning impossible, no matter with what leniency or wisdom it may be enforced, suit may be brought against the enforcement officers to enjoin its enforcement regardless of any active threats by them.[1] The need for relief in this situation is precisely the same as in the case of active threats of immediate enforcement. "The real test [of equitable jurisdiction] should be the imminence of irreparable injury; imminence of enforcement is merely a circumstance which is sometimes relevant in determining the existence of present injury."[2] Here, the injury is present and real and is created by the Act itself, though its enforcement be deferred to a later date, or even indefinitely.

Ex parte La Prade,[3] cited below by the cross-defendants in this connection, involved merely the question of the construction of a statute allowing the substitution of a state officer as a defendant in a suit brought against his predecessor in office. Here the responsible enforcement officers are in court and an injunction is sought against the enforcement of a statute which immediately affects and injures

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[1] *Carter* v. *Carter Coal Co., supra; Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S. 65 (1902); *North American Co.* v. *Landis*, 85 F. (2d) 398 (App. D. C. 1936); *cf. Railroad Retirement Board* v. *Alton R. Co., supra; Panama Refining Co.* v. *Ryan, supra; Packard* v. *Banton*, 264 U. S. 140 (1924); *Kennington* v. *Palmer*, 255 U. S. 100 (1921); *Hammer* v. *Dagenhart, supra; Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146 (1919); *Jacob Ruppert* v. *Caffey*, 251 U. S. 264 (1920).

[2] Note (1937) 50 Harv. L. Rev. 655, 658-659.

[3] 289 U. S. 444 (1933).

the complainants by its very existence. *Carter* v. *Carter Coal Co., supra.*

But assuming that threats are necessary, they are abundantly shown to be present here. The very institution and continued prosecution of this suit, which was brought "to enforce compliance with the Act", is most persuasive evidence of such intention. The relief which plaintiff requests is that the defendants be required to register. Its purpose in seeking this relief is not to secure a notification of registration, as such, but to secure jurisdiction over defendant companies and their subsidiaries to enforce against them the applicable control provisions.

If this purpose were otherwise ambiguous, it is made entirely clear by statements of both the Attorney General and the Commission, made immediately prior to the institution of the action, in which they stated, *"In enforcing the Act,* it is proposed promptly to institute civil proceedings against one or more large or important companies who may fail to register *to enforce compliance with its provisions".* A press release of the Commission issued at the same time stated, "it is the purpose of the Commission to proceed promptly with the *administration and enforcement of the law"* (R. IV, 650). As recently as last May, the plaintiff and cross-defendants, in their memorandum submitted to this Court in support of defendants' first petition for certiorari, urged the importance of a prompt determination of this case in order that the Government might "be able to undertake *effective administration and enforcement of the Holding Company Act"* at the earliest possible date. Similarly, the motion made in January, 1938, in this Court to advance the argument stated: "A final decision by this

Court is, therefore, necessary before a start can be made in the administration of this important Act of the Congress."

Further evidence is furnished by the extensive action already taken by the Commission in the administration of such provisions, of which the Court, by the stipulation, may take judicial notice.[1] A pamphlet issued by the Commission on May 15, 1937, containing its general rules, regulations and forms shows that the Commission is actively engaged in enforcing those very provisions of the Act which it has stated below that it has made no threat to enforce. It has issued rules regulating the acquisition of securities under section 9, and forms for applications for approval of such acquisitions under 10. It has promulgated rules regulating the acquisition, retirement and redemption of securities of the issuer under 12(c), and governing the declaration and payment of dividends under the same section. It has issued extensive regulations and forms regulating service, sales and construction contracts under 13. It has promulgated a uniform system of accounts for registered holding companies and their subsidiaries under 15. It has adopted forms for applications under 7 for approval of the issuance of securities. It has promulgated rules concerning the solicitation of proxies.

In addition to these general rules, regulations and forms, and the many other less important ones contained in the pamphlet above referred to, the Commission has made innumerable specific orders in the course of its administration of almost all the sections of the Act. Thus, it has

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[1] R. II, 274.

acted, after hearing, upon many varied applications for exemption of security issues under section 6, for approval of such issues under 7, for approval of security acquisitions under 9(a)(2) and 10, of utility asset acquisitions under 10, of dividend payments under 12(c) and of the purchase by the applicant of its own securities under the same section. It has made many orders with respect to applications for approval of mutual service companies and subsidiary service companies under 13(b). It has taken steps looking towards the enforcement of 11 in the issuance of orders concerning a proposed plan of reorganization of American Water Works and Electric Company.

The cross-bill states a cause of action falling within firmly established equitable principles: present and immediately threatened irreparable damage for which there is no adequate remedy at law caused both by the existence and the threat of enforcement of a statute which cannot be constitutionally administered. *Pierce* v. *Society of Sisters, supra; City Bank Co.* v. *Schnader, supra.*

(2) The right to a declaratory judgment.

If an injunction is not appropriate, the case falls within the Declaratory Judgment Act[1] which permits declaratory judgments in "cases of actual controversy". If the existence of a case or controversy, as those words are used in Article III, Section 2, of the Constitution, can be shown, the statute entitles the litigant to relief.[2] There is no need

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[1] 48 Stat. 955, 28 U. S. C. A., §400.

[2] *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 (1937).

to allege or prove, as when seeking an injunction, that irreparable injury is imminent; it is enough that the defendants are adversely affected by the Act and that the cross-defendants intend to enforce its provisions.[1]

VI.

The rights, liabilities and duties of the subsidiaries of the holding company defendants were properly presented for adjudication by their cross-bill and bill of intervention.

The intervening defendants seek to present, by their bill of intervention and the cross-bill of the parent holding companies in which they have joined, the question of their rights and liabilities under the Act, consequent upon the registration of such parent holding companies if they be required to register as, in effect, ordered by the decree. The courts below have denied them this right. This we submit was error.

Central Arizona Light and Power Company, Spokane United Railways and Spokane Central Heating Company are typical of a large number of subsidiaries of the holding companies which will be brought in subjection to this Act upon the registration of their parent holding companies. The first named is an intrastate public utility, operating entirely within the State of Arizona. The others are not

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[1] *Fosgate Co.* v. *Kirkland,* 19 F. Supp. 152 (S. D. Fla., 1937); *Black* v. *Little,* 8 F. Supp. 867 (E. D. Mich., 1934); *Gully* v. *Interstate Natural Gas Co.,* 82 F. (2d) 145 (C. C. A. 5th, 1936). See also *Nashville C. & St. Louis Railway* v. *Wallace,* 288 U. S. 249, 264 (1933).

public utilities as defined in the Act. They operate, respectively, a street railway and a central heating system in Spokane.

Clearly, Congress has no conceivable jurisdiction over them, except when and as they may, incident to their business, engage in some specific transaction in interstate commerce which may subject them to any regulation appropriate to that transaction. So long as they confine their activities, as they normally do, to the state in which they operate, they are entitled to be entirely free from any form of federal control. By decree here they are subjected to the rigid and drastic system of control prescribed by the Act and are held to be without right to a determination of the validity of such control at this time.

The Act, in effect, requires their parent holding companies to register for them and as construed by the courts below gives them no right to be heard in protest against the consequences of the registration. Thus involuntarily, and by a proceeding to which, in effect, they are held not to be qualified parties, they are subjected to the status of subsidiaries of registered holding companies and the immediately applicable controls of the Act.

We submit, upon the principles above stated, that all of the cross-defendants having appeared and submitted to the jurisdiction of the Court, each of the intervening defendants, being a party to the cross-bill, is now entitled to a determination of its rights thereunder.

VII.

For the reasons stated in the foregoing points, the decree of the District Court and the order of the Circuit Court of Appeals affirming such decree were erroneous.

Respectfully submitted,

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Appendix A.

Legislative Background of the Act.

The legislative background of the Act consists of the report of the National Power Policy Committee which originated the bill, the President's message to Congress transmitting this report, the hearings before the Senate and House Committees which had the bill under consideration, the reports of these Committees, and the debates on the floor of Congress.

The message of the President transmitting to Congress the report of the National Power Policy Committee stated in part:[1]

> "The disappearance at the end of 5 years of those utility holding companies which cannot justify themselves as necessary for the functioning of the operating utility companies of the country is an objective which congressional leaders I have consulted deem essential to a realistic and far-sighted treatment of the evils of public utility holding companies. For practical reasons we should offer a chance of survival of [*sic*] those holding companies which can prove to the Securities and Exchange Commission that their existence is necessary for the achievement of the public ends which private utility companies are supposed to serve. For such companies, and during the interim period for other companies, the proposal for a comprehensive plan of public regulation and control is sound."

The National Power Policy Committee, in its report, after recommending federal legislation regarding public utility holding companies, outlined its conception of what such legislation should contain as follows:[2]

> "1. The ultimate purpose of the legislation should be the practical elimination within a reasonable time of the holding company where it serves no demonstrably useful and necessary purpose * * *.

[1] Hearings before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., pp. 1-3.

[2] Hearings before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., pp. 3-9.

"* * * if the disappearance of the holding-company excrescence is to be realistically expected at the end of a given period, there must be a constant pressure on the managers of holding-company enterprises persistent from the very beginning of that period, to insure a continual process of whittling down complicated capital structures and of disassociating operating properties not related to each other geographically or economically. * * * The devices recommended below are devices to effect that continual pressure to compel that continual dismantling process.

"2. To attain the flexibility desirable for the handling of this complicated problem in a realistic and prudent way, Federal control should be vested in an administrative commission. Every holding company should be required to register with this commission if, either directly or through subsidiary companies, it employs the instrumentalities of interstate commerce to distribute securities, to transmit or transport electric energy or gas, to perform contracts, or to carry on any business. * * * At the time of registration, the companies should be required to file with the commission detailed information concerning their financial condition and operations, their security structure, their control over and relations with subsidiaries, and their affiliations with other interests of whatever kind. The definition of a holding company should be broad enough and flexible enough to reach every company which in fact controls public utility companies, whether or not that control be dependent upon a specified security ownership. Federal registration provides the legal mechanism for controlling the activities of registered holding companies and their associate interests."

The report then proceeds to outline the substantive regulatory provisions, substantially as embraced in the Act, which it believed should be enacted, without any further mention of the filing of information as itself an effective instrument of public policy.

The hearings before the Senate Committee on Interstate Commerce on S. 1725, the bill which subsequently became the Act, opened with the insertion in the record of

the "Statement of Senator Burton K. Wheeler[1] on the Public-Utility Holding Company Bill." The first paragraph of the statement is as follows:

> "This bill is intended to whittle down and ultimately eliminate public-utility holding companies. Its details are summarized section by section in an analysis which I am making available to the Senate and the public. Its spirit is the spirit of the bill I propose for a Federal tax on bigness, i. e., a tax on corporations based on their size. Both these bills are essential in what I consider the only program that can eventually restore to us the reality of that theory of economic and political democracy by which we fondly like to think this nation lives. The cold facts show that the theory isn't reality—that the concentration of economic power is growing today faster than it has ever grown before. Many believe we cannot reverse that trend. I think we can—if we think clearly and let our minds be bold. I think we must—if we are to avoid fascism or communism without being sure which of the two we may get." (p. 65).

Immediately thereafter there was inserted a statement of Congressman Rayburn, Chairman of the House Committee on Interstate and Foreign Commerce, which stated in part:

> "As an immediate program, therefore, I am offering a bill which is intended to accomplish the compulsory dissolution, under the trusteeship of the Securities and Exchange Commission, of public utility holding companies which have not been voluntarily dissolved within a reasonable period of time. Pending compulsory dissolution and as inducements to the continual progress of voluntary dissolution during such period, the bill provides for—
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> (1) Simplification of unnecessarily complicated holding company structures and the elimination from holding systems of geographically and economically unrelated properties. * * *" (p. 69).

Neither of these statements by the sponsors of the bills in the House or Senate even mentions the informatory requirements.

[1] Chairman of the Senate Committee on Interstate Commerce.

Of the witnesses who appeared and testified before the Senate Committee on behalf of the bill, only Mr. Corcoran, one of its co-authors, discussed or threw any light upon its specific provisions or objectives. Mr. Corcoran stated (pp. 201-202):

> "I once heard a wise man talking about regulation say, 'When I think of trying to regulate the kind of aggregations of power we have in this country with what the Government has in the way of tools to do the regulating, I keep thinking to myself, "What regulations would I make for 100-ton trucks going up the village street?" The answer is that the only regulation for 100-ton trucks going up a village street is that you cannot have them going up a village street at all. You have just got to say, "There will be no 100-ton trucks on this street."'
>
> "That is where we are. That is the condition of the utility industry which the National Power Policy Committee and all of these other Government investigatory bodies have found. What does the committee recommend as the way out of these difficulties? * * * At the end of the analysis of the bill, which was distributed this morning, there is a statement by Mr. Rayburn introducing the bill in the House, in which he summarized the report of the Power Policy Committee and the recommendations made by it, in very compact form. It is on page 4 of the Rayburn statement attached to this analysis."

Mr. Corcoran then read excerpts from the Rayburn statement, including the portion quoted at page 79, *supra*, and continued:

> "As you will see, the kind of a utility set-up that this bill contemplates is a simplified set-up, simplified so that it will primarily serve the operating needs of the local communities which are giving the operating companies the benefit of a local monopoly and an exemption from competition so that they can serve their communities well.
>
> "The bill also attempts to simplify the problems of the investor by encouraging a simple capital structure and a simple company so far as its property interests are concerned, so that when the investor buys into this greatest of all our industries he

will buy into a company in which the security structure is simple enough so that he will know what he is getting, and, furthermore, he will buy into a public utility operating-company business and nothing else. He will not be buying into the gasoline business, and he will not be buying into half a dozen other unrelated businesses which, buying as the average investor buys securities, he would not completely understand he was going into.

"The bill contemplates an attempt to rearrange the utility map of the United States through the mechanism of regulation and through the mechanism of inducing and, if necessary, compelling a reduction of the size of these holding-company units down to units that will constitute regional systems, regional geographically and regional economically" (p. 202).

The remainder of Mr. Corcoran's testimony is largely taken up with explaining how the simplification process could be carried out and the properties of the holding companies liquidated or distributed among security-holders without a single reference to any other purpose of the bill than that of eliminating or simplifying holding company structures and specifically with no reference to the function of the registration statement as a medium of information to investors, consumers, public regulatory bodies or others.

The hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, a companion and substantially identical bill to S. 1725, demonstrate equally clearly that Congress intended to regulate holding companies by control and elimination, and not through disclosure of information.

The testimony of Commissioner Healy of the Securities and Exchange Commission and a member of the Power Policy Committee is particularly significant. He commented upon the difference between the bill under consideration and the Securities Act of 1933, pointing out that the object of the Securities Act was to require publicity and not to control the issuance of securities, whereas the object of this Act was directly to control the issuance.[1] His further statement is quoted in footnote 1 on page 65, *supra*.

[1] Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess., pp. 131-136.

Commissioner Healy's views as to the ultimate purpose of the bill are likewise shown by his answers to questions put to him by Representative Lea (pp. 147-148):

> Mr. Lea: "If we limit the life of a company and start in to regulate it with termination of its activities staring us in the face, do we not regulate under unfavorable circumstances? Would it not be more difficult to expect good results with that regulation?"
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> Commissioner Healy: "No, sir."
>
> Mr. Lea: "I am not expressing my viewpoint. I am just asking for yours."
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> Commissioner Healy: "I am just making as good a guess as I can. I should think that good regulation would promote the final elimination of the companies."

Dr. Splawn of the Interstate Commerce Commission, who was special counsel to the House Committee on Interstate Commerce and formulated its report, expressed the same views as Commissioner Healy with respect to the ultimate purpose of the bill. He stated (p. 186):

> "I do not believe they [local commissions] should regulate the holding companies. * * * They are too difficult to regulate either by the State or Federal Government. The difficulties in regulating them are too great. The best thing, I think, is just to do a little pruning."

Again, in answering the question, "Are you of the opinion that it is necessary to eliminate holding companies in order to cure the evils and abuses which have been related here?", Dr. Splawn said, "That is my judgment" (p. 193).

Subsequently, Mr. Wolverton of the House Committee asked Dr. Splawn whether, in view of the declared policy of the Act "in accordance with which policy all the provisions of this title shall be interpreted * * * to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties not economically and geographically related in operations, and to provide at the end of five years for the abolition of the public-utility holding company"[1] it would be "possible for any public-utility company to exist if that declaration of policy was carried out by the administrative board or agency"

[1] Compare section 1(c) of the Act which closely follows the quoted language of the bill.

(p. 2239). After sparring with the question and evading a direct answer, Dr. Splawn said:

> "I think it means that by the end of five years the type of companies not otherwise exempted from the bill would be out" (p. 2240).

This brought Chairman Rayburn of the Committee into the discussion in defense of the policy stated who said, among other things (p. 2241):

> "And the President in his message, if I may say so, said very definitely, that the holding company as it is now set must go, and I do not think there is anybody in this room who does not agree * * *."

Mr. Rayburn likewise placed on the record an analysis of the bill which opens with the following:

> "In introducing H. R. 5423, Congressman Rayburn issued a statement (which is appended hereto) setting forth the reasons for the enactment of legislation at this time to deal with the public utility holding company and the policies which such legislation should embrace. His general description of the evil to be remedied has been amplified in considerable detail by the testimony of Dr. Splawn and Judge Healy in the committee's hearings.
>
> "A detailed section analysis of title I of this bill follows:" (p. 321)

which analyzed the measure section by section, and, with respect to the registration provision in the bill, which is substantially the same as that of the present Act, stated:

> "This section establishes the mechanism by which holding companies are brought under the jurisdiction of the Commission so that the provisions of the title may be effectively administered. That mechanism is registration, and it is made the duty of every holding company to register by October 1, 1935, if it is to carry on any of the activities which are national in scope and hence of particular concern to the Federal Government. Unregistered companies after that date are prohibited to engage in these activities unless they are registered" (p. 325).

Further with respect to the requirements of the registration statement the analysis says:

> "The comprehensive character of the enumeration of required material is designed to give the Commission adequate authority to secure all pertinent information concerning the holding company and its relations with subsidiaries and affiliates. Such information is necessary not only for the protection of investors and consumers, but to enable the Commission to formulate administrative policy governing the operation of the substantive provisions of the act" (p. 326).

The simplification or elimination provisions are described at length and with respect to them the following significant statement is made:

> "The foregoing provisions are designed to produce a gradual and orderly elimination of the utility holding companies. Present companies, since they are put under regulation at once and required to simplify their structures under Commission supervision would be placed in a condition in which their elimination could be effected with a minimum of financial abuse or other injury to investors or consumers" (p. 334).

The report of the Senate Committee characterized section 11 as "the very heart of the title, the section most essential to the accomplishment of the purposes" sought to be achieved, and both the House and Senate Committee Reports[1] said of section 4:

> "This section establishes the mechanism by which holding companies are brought under the jurisdiction of the Commission so that the provisions of title I may be effectively administered."

and of section 5:

> "This section sets up the machinery for registration and lists the information required of registered companies."

The debates on the floor of the Senate show again that the purpose of Congress was to eliminate and simplify

[1] House Report No. 1318; Senate Report No. 621.

holding company systems and not to regulate them by means of publicity. There is not a word in these debates which indicates that Congress believed that the abuses which it sought to eradicate could effectively be cured by the mere requirement that information concerning holding company activities should be filed.

At the very outset of the debate Senator Wheeler stated:[1]

> "Let me say to the Senator that I think elimination is necessary in the case of those companies which have subsidiaries scattered from one end of the country to the other. And by 'elimination' I mean—and that is the way the bill uses the term—that they either confine their holdings to a single geographically and economically integrated public-utility system, or else cease to be holding companies of utility operating companies."

Then in response to a question by Senator Vandenberg, "Does the Senator contend that the evil cannot be reached by Federal regulation?" Senator Wheeler replied:

> "I do not think it is possible effectively to regulate them in their present size and power and concentration of control. My view is that the Government cannot do it. The States have absolutely failed and admit they have failed. It is impossible for the States effectively to regulate them. In my judgment it is impossible for the Government of the United States to be able to regulate effectively these great holding companies which own properties scattered all over the United States."[2]

Subsequently when Senator Vandenberg asked whether the Securities Act was not protection against the exploitation of investors by holding companies, Senator Wheeler remarked:

> "Something has been said with reference to the Securities Act. Let me call attention to the fact that the Securities Act was really what we commonly call a publicity act—a 'Truth in Securities Act'—no more than that.

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[1] Cong. Rec. 74th Cong., 1st Sess., p. 8698.

[2] *Id.*, p. 8698.

> "It does not prevent the issue of the various types of holding company securities and it does not deal with services in the engineering field. It does not, in fact, actually control the issue of any securities—it is merely designed to try to get the truth told about securities which are issued to the public, so that if the public has the time and the ability it can to some extent find out what is being sold to it."[1]

The distinction between the type of regulation imposed by the Securities Act and that proposed by the bill under consideration was again commented upon by Mr. Wheeler in language substantially to the same effect as that quoted above.[2]

During the course of the debate, Mr. Wheeler inserted in the record a memorandum in support of the constitutionality of the bill, drafted by Mr. Cohen and Mr. Corcoran, which contains the following significant language:[3]

> "The ultimate cure of the evils described in this introductory section which the bill adopts is the abolition of the holding company conducting activities in interstate commerce and by means of the mails, except where it is necessary for the operation of a geographically and economically integrated public-utility system. This prohibition is postponed, however, to permit orderly liquidation and reorganization and so to prevent unnecessary destruction of existing security values. The bill also prescribes regulation designed to furnish protection to investors and consumers during the remaining period of holding-company existence and as a permanent measure in the case of those companies that are permitted to continue. This is achieved through registration."

Subsequently, in opposing a suggested amendment to section 11, Senator Wheeler read to the Senate a message from the President as follows:[4]

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[1] *Id.*, p. 8704.
[2] *Id.*, p. 9085 *et seq.*
[3] Cong. Rec. 74th Cong., 1st Sess., p. 9379.
[4] *Id.*, p. 8713.

"To verify my talk with you this morning, I am very clear in my own mind that while clarifying or minor amendments to section 11 cannot be objected to nevertheless any amendment which goes to the heart or major objective of section 11 would strike at the bill itself and is wholly contrary to the recommendations of my message."

Senator Wheeler then continued:[1]

"The very essence of a common-sense scheme of public regulation is, therefore, that the corporations to be regulated should not be permitted to reach a size and power and a complication where a Federal regulatory body cannot be a match for them. These cold-blooded factors of man power and money power have made State regulation of utilities an admitted failure, and, to speak bluntly, have in many cases already made comparable Federal regulation of other great corporations merely a shield behind which the supposedly regulated corporations can hide from public criticism rather than a sword with which government can keep them from plundering the public.

"All that is done by section 11 is done by that part which the Dieterich amendment would discard. It is an attempt to whittle down the size and power and complication of these giant corporations until the Federal and State commission can be a match for them. It does not destroy holding companies. But it does say to them, 'You've made so much trouble that if you're going to go on doing business in this country controlling legal monopolies which the public must be able to regulate, you've got to trim down to a size and power and structure where the public can cope with you.'

"I do not know whether Senators think that ought to be called 'elimination', but I do know it is the very essence of a realistic approach to regulation; and the utilities know it too."

Senator Barkley expressed substantially the same views as Senator Wheeler. His remarks contain the following significant language:

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[1] *Id.*, p. 9380.

"The Securities Act which we passed simply required that corporations issuing stock must tell the truth about the stock. They must reveal to the public the value of the physical property behind the stock, so that an investor might be his own judge as to whether he desired to invest in that stock; but that act does not prevent the issue of such stock to the public when the information has been registered with the Commission. It punishes those who are responsible for any false information calculated to deceive the public, but it does not go to the extent of this bill in attempting to provide a reorganization and dissolution of these concerns which have spread out all over the country and have no intimate connection with the operation of the utilities where they exist."[1]

The arguments in the debates in the House by the proponents of the bill were essentially similar to those advanced by Mr. Wheeler in the Senate. The following statement of Representative Rayburn should be noted:

"It is all very well for members to point out that these facts are contained in registration statements filed at the Securities & Exchange Commission pursuant to the Securities Act of 1933, and that the publicity attaching thereto will prevent such happenings in the future, but for the average investor to understand these matters he must read over 20 pages of footnotes to ascertain the meaning of the entries and adjustments in the printed balance sheet. It is to prevent such manipulation of the money of many thousands of investors that this public-utility holding company bill is proposed."[2]

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[1] *Id.*, p. 9385.

[2] *Id.*, p. 10731.

APPENDIX B.

PRESENT EXTENT OF REGULATORY POWER OF STATE COMMISSIONS AND MUNICIPALITIES OVER VARIOUS ASPECTS OF OPERATIONS OF ELECTRIC UTILITY COMPANIES AND THEIR HOLDING COMPANIES

PRESENT EXTENT OF REGULATORY POWER OF STATE ASPECTS OF OPERATIONS OF ELECTRIC UTILITY

State	Accounting	Depreciation	Issuance and Sale of Securities	Rates and Service	Contracts with Affiliated Interests
Alabama	Code 1928, Ch. 335, §9786; Gen. Order U-1 of Pub. Serv. Comm.	Code 1928, Ch. 335, §§9769, 9741	Code 1928, Ch. 335, §§9741, 9744-7, 9750, 9752-3; Acts 1932 No. 232 (1st Sp. Sess.), §§12, 13	Code 1928, Ch. 335, §§9631-2, 9741	Acts 1932, No. 232 (1st Sp. Sess.), §5 (See 1936 Supp. to Code §9824e)
Arizona	Code 1928, §704	Code 1928, §705	Code 1928, §708	Code 1928, §§674, 676, 689, 717	
Arkansas	Acts 1935, No. 324, §22a	Acts 1935, No. 324, §19(5)	Acts 1935, No. 324, §§58, 59	Acts 1935, No. 324, §§10, 11, 19(1) 19(2), 19(3)	
California	Gen. Laws of Cal. (1931), Title 464, §48	Gen. Laws of Cal. (1931), Title 464, §49	Gen. Laws of Cal. (1931), Title 464, §§52 & 52½, as amended by Acts 1937, No. 249	Gen. Laws (1931), Title 464, §§14, 15, 19, 46, 63	
Colorado	Ann Stats. 1935 Ch. 137, §34	Ann Stats. 1935 Ch. 137, §35		Ann Stats. 1935 Ch. 137, §§14, 15, 16, 17, 19, 23 & 24	
Connecticut	Revision of 1930, §3602-3, as amended by Laws 1937 Ch. 141		1935 Supp. to Conn. Gen. Stats., §1414c	Revision of 1930, §§3597, 3599; 1935 Supp., §1414c	
Delaware				L.1927, Ch. 144*	
Florida				*See Note a	
Georgia	Code 1933, §93-307		Code 1933, §93-414	Code 1933, §§93-307, 93-309	
Idaho	Ann. Code 1932, §59-524	Ann. Code 1932, §59-525		Ann. Code 1932, §§59 - 502, 59 - 503, 59-520	

COMMISSIONS AND MUNICIPALITIES OVER VARIOUS COMPANIES AND THEIR HOLDING COMPANIES

Banking Transactions with Affiliated Interests	Acquisition of Utility Stocks by Holding Companies	Consolidation of Utility Properties by Merger, Consolidation or Purchase	Certificates of Convenience and Necessity	Dividends	Sale of Assets
Acts 1932, No. 232 (1st Sp. Sess.), §5 (See 1936 Supp. to Code §9824e)	Code 1928, Ch. 335, §§9825-6	Code 1928, Ch. 335, §§9825-7	Code 1928, Ch. 335, §9795	Acts 1932, No. 232 (1st Sp. Sess.), §§6 and 7 (See 1936 Supp. to Code §9824 f & g)	
	Code 1928, §707	Code 1928, §707	Code 1928, §706		Code 1928, §707
	Acts 1935, No. 324, §57a(2)	Acts 1935, No. 324, §57	Acts 1935, No. 324, §§41, 42, 43		Acts 1935, No. 324, §57a (3)
	Gen. Laws (1931), Title 464, §51b	Gen. Laws (1931), Title 464, §51a	1933 Supp. to Gen. Laws, Title 464, §50		Gen. Laws 1931, Title 464, §51a
			Ann. Stats. 1935, Ch. 137, §36		
		Revision of 1930, §3616; 1935 Supp. §1414c			Revision of 1930, §3616; 1935 Supp. §1414c
			Ann. Code 1932, §59-526		

PRESENT EXTENT OF REGULATORY POWER OF STATE
ASPECTS OF OPERATIONS OF ELECTRIC UTILITY

State	Accounting	Depreciation	Issuance and Sale of Securities	Rates and Service	Contracts with Affiliated Interests
Illinois	Rev. Stats. 1935, Ch. 111a, ¶¶26-8	Rev. Stats. 1935, Ch. 111a, ¶29	Rev. Stats. 1935, Ch. 111a,¶¶35-41	Rev. Stats. 1935, Ch. 111a, ¶¶48-51	Rev. Stats. 1935, Ch. 111a ¶23(1)
Indiana	Burn's Ann. Ind. Statutes (1926), §§12684 and 5	Burn's Ann. Ind. Stats. (1926), §§12693 and 4	Burn's Ann. Ind. Stats. (1926), §§12759, 12760 (as amended by Acts of 1933, Ch. 190 §7a), 12761, 12762 (as amended by Acts of '33 Ch. 190, §8), 12763 and 4	Burn's Ann. Ind. Stats. (1926), §§12678, 12699. 12716, 12722 (as amended by Ch. 146 §1 of Acts of 1927 (S. B. 127), (p. 445), 12732 and 12743	Burn's Ann. Ind. Stats. (1926), §12767 (as amended by Acts of 1933, Ch. 190, §6)
Iowa				Code 1927, §6143.* See Note b	
Kansas	Rev. Stats. 1923, §66-122		Rev. Stats. 1923, §66-125	Rev. Stats. 1923, §§66-107	L. 1931, Ch. 239
Kentucky	Carroll's Ky. Stats. (1936), §3952-22		Carroll's Ky. Stats. (1936), §3952-24	Carroll's Ky. Stats. (1936), §§3952-14 to 3952-19, 3952-27	
Louisiana				La. Const., Art. VI, §4	Acts 1932, No. 203
Maine	R. S. 1930, Ch. 62, §§17, 18, 19, 20, 21, 22 (as amended by L. 1931, Ch. 117), 23, 24		R. S. 1930, Ch. 62, §§41, 42, as amended by Laws 1931, Ch. 120, and Laws 1937, Ch. 41	R. S. 1930, Ch. 62, §§25-38 (incl.)	R. S. 1930, Ch. 62, §38-A, as added by L. 1933, Ch. 213
Maryland	Ann. Code 1924, Art. 23, §388		Ann. Code 1924, Art. 23, §392	Ann. Code 1924, Art. 23, §387	
Massachusetts	G. L. 1932, Ch. 164, §81	G. L. 1932, Ch. 155, §5A	G. L. 1932, Ch. 164, §§14-18	G. L. 1932, Ch. 164, §94	G. L. 1932, Ch. 164, §§9A, 85A (as added by L. 1933, Ch. 202, §1), 94B

COMMISSIONS AND MUNICIPALITIES OVER VARIOUS COMPANIES AND THEIR HOLDING COMPANIES

Banking Transactions with Affiliated Interests	Acquisition of Utility Stocks by Holding Companies	Consolidation of Utility Properties by Merger, Consolidation or Purchases	Certificates of Convenience and Necessity	Dividends	Sale of Assets
Rev. Stats. 1935, Ch. 111a, ¶42	Rev. Stats. 1935, Ch. 111a, ¶42	Rev. Stats. 1935, Ch. 111a, ¶42	Rev. Stats. 1935 Ch. 111a, ¶71	Rev. Stats. 1935, Ch. 111a, ¶42(1)	Rev. Stats. 1935, Ch. 111a, ¶42
	Burn's Ann. Ind. Stats. (1926), §12767	Burn's Ann. Ind. Stats. (1926), §12768	Burn's Ann. Ind. Stats. (1926), §12770 (as amended by Acts of 1933, Ch. 190, §9)		Burn's Ann. Ind. Stats. (1926), §§12767 and 12768
L. 1933 (Sp. Sess.), Ch. 88	Rev. Stats, 1923, §66-127	Rev. Stats, 1923, §66-127. See note e	Rev. Stats, 1923, §§66-131	L. 1933 (Sp. Sess.), Ch. 88	Revised Stats, 1923, §66-136
			Carroll's Ky. Stats. (1936) §3952-25		
R. S. 1930, Ch. 62, §38-A, as added by L. 1933, Ch. 213	R. S. 1930, Ch. 62, §44	R. S. 1930, Ch. 62, §44			R. S. 1930, Ch. 62, §44
	Ann. Code 1924, Art. 23, §394	Ann. Code 1924, Art. 23, §394. See note e	Ann. Code 1924, Art. 23, §370, as amended (See 1935 Supp. to Ann. Code, p. 292)		Ann. Code 1924, Art. 23, §394
G. L. 1932, Ch. 164, §17, §17A (as added by L. 1932, Ch. 132). See note c	G. L. 1932, Ch. 164, §9A	G. L. 1932, Ch. 164, §§96, 97, 100	G. L. 1932, Ch. 164, §§71-75A (incl.)	G. L. 1932, Ch. 164, §11. See note k	G. L. 1932, Ch. 164, §21

PRESENT EXTENT OF REGULATORY POWER OF STATE
ASPECTS OF OPERATIONS OF ELECTRIC UTILITY

State	Accounting	Depreciation	Issuance and Sale of Securities	Rates and Service	Contracts with Affiliated Interests
Michigan	Comp. Laws(1929), §11098		Comp. Laws(1929), §§11016, 11077, 11078, 11079	Comp. Laws(1929), §§11093, 4, 9, & 11873	
Minnesota				Mason's Minn. Stats. (1927), §§1714, 4718, 7433; (1936 Supp.), §1491-5*. See note d	
Mississippi				Code 1930, §2426; G. L. (1934), Ch. 318 (S. B. #321)*	
Missouri	Rev. Stats. of Mo. (1929), §5190	Rev. Stats. of Mo. (1929), §5200	Rev. Stats. of Mo. (1929), §§5194, 6 & 8	Rev. Stats. (1929), §§5189, 5190, 5191, 5203	
Montana	Rev. Code 1935, §3885			Rev. Code 1935, §§3891, 3897, 3899, 3906, as amended by Laws of 1937 c. 56	
Nebraska	Comp. Stats. 1929, §75-1201		Comp. Stats. 1929, §75-1201	Comp. Stats. 1929, §§75-1002, 70-501, 2; 1933 Laws of Neb., Ch. 60, p. 291. See note j	
Nevada	Comp. Laws 1929, §6109			Comp. Laws 1929, §6116	
New Hampshire	P. L. 1926, Ch. 240, §§7, 12	P. L. 1926, Ch. 240, §9	P. L. 1926, Ch. 241, §§1-14 (incl.); L. 1929, Ch. 136	P. L. 1926, Ch. 238, §5 as added to by L. 1931, Ch. 127, §2; P. L. 1926, Ch. 240, §2; P. L. 1926, Ch. 242, §7	L. 1933, Ch. 182, §§2-6 (incl.); L. 1929, Ch. 179
New Jersey	1911-24 Cum. Supp. to Comp. Stats., §167-17d	1911-24 Cum. Supp. to Comp. Stats., §167-17f	1911-24 Cum. Supp. to Comp. Stats., §167-24e	1911-24 Cum. Supp. to Comp. Stats., §167-16c	Laws of 1935, Ch. 44
New Mexico				1929 New Mexico Stats. Ann.; Ch. 90, §402 (90, 93); Ch. 90, §2207*. See note f	
New York	P. S. L., §66(4)		P. S. L., §69	P. S. L., §66(5), §72	P. S. L., §110

COMMISSIONS AND MUNICIPALITIES OVER VARIOUS COMPANIES AND THEIR HOLDING COMPANIES

Banking Transactions with Affiliated Interests	Acquisition of Utility Stocks by Holding Companies	Consolidation of Utility Properties by Merger, Consolidation or Purchase	Certificate of Convenience and Necessity	Dividends	Sale of Assets
		Comp. Laws (1929), §§11328-11341	Comp. Laws (1929), §§11088-11092		
	Rev. Stats. (1929), §5195	Rev. Stats. (1929), §5195	Rev. Stats. (1929), §5193	Rev. Stats. 1929, §5197. See note p	Rev. Stats. 1929, §5195
		Neb. Const., Art. X, §3		Neb. Constitution, Art. X, §5	
			Comp. Laws 1929, §6137		
1933, Ch. 182, §§2-6 (incl.)	P. L. 1926, Ch. 240, §31	P. L. 1926, Ch. 240, §31. See note e	P. L. 1926, Ch. 240, §§21, 24		P. L. 1926, Chap. 240, §§28, 29
Laws of 1935, Ch. 46. See note c	1911-24 Cum. Supp. to Comp. Stats., §167-25 as amended by Laws of 1935, Ch. 47, p. 126	1925-1930 Supp. to Comp. Stats., §167-24h	1925-30 Supp. to Comp. Stats., §167-17i	Laws of 1935, Ch. 46	1925-30 Cum. Supp. to Comp. Stats. §167-24h
			1929 N. M. Stats. Ann., Ch. 90, §§2201-2206 (incl.). See note g		
P. S. L., §110	P. S. L., §70	Stock Corp. Law §85(5)	P. S. L., §68		P. S. L., §70

PRESENT EXTENT OF REGULATORY POWER OF STATE

ASPECTS OF OPERATIONS OF ELECTRIC UTILITY

State	Accounting	Depreciation	Issuance and Sale of Securities	Rates and Service	Contracts with Affiliated Interests
North Carolina	Con. Stats. 1919, Ch. 21, §1037 as amended by L. 1931, Ch. 455, §1; L. 1933, Ch. 307, §13		Con. Stats. 1919, Ch. 21 as amended by L. 1933, Ch. 307, §§18-28 (incl.)	Con. Stats. 1919, Ch. 21 as amended by L. 1933, Ch. 307, §§2-11 (incl.), 22	Con. Stats. 1919, Ch. 21, as amended by L. 1931, Ch. 455, §1; L. 1933, Ch. 307, Sec. 17
North Dakota	1913-25 Supp. to Comp. Laws, Ch. 13b, §4609c11		1913-25 Supp. to Comp. Laws, Ch. 13b, §4609c20	1913-25 Supp. to Comp. Laws, Ch. 13b, §4609c4 & 5; L. 1935, Ch. 253	
Ohio	Throckmorton's Ann. Code (1936), §§499-14, 614-10	Throckmorton's Ann. Code (1936), §614-49	Throckmorton's Ann. Code (1936), §614-53	Throckmorton's Ann. Code (1936), §614-23; §614-44	
Oklahoma				Okl. Stats. (1931), Ch. 20, Art. 9, §3618	
Oregon	Ore. Code 1930, §§61-211 to 61-216 (incl.)	Ore. Code 1930, §§61-217, 218	L. 1933, Ch. 441, §§10-27 (incl.)	Ore. Code 1930, §§61-221 to 61-262 (incl.), 61-271, 272	L. 1933, Ch. 441, §§1-9 (incl.)
Pennsylvania	Acts 1937, No. 286, §§501, 502	Acts 1937, No. 286, §503	Acts 1937, No. 286, §§601-4	Acts 1937, No. 286, §§301-313	Acts 1937, No. 286, §§701-6
Rhode Island	G. L. 1923, Ch. 253, §58		§62 of Ch. 253 of Gen. Laws as added by Laws of 1936 (S. B. No. 244)	G. L. 1923, Ch. 253, §§18-26 (incl.), 38-44 (incl.), 48, (§21 as amended L. 1926, Ch. 778)	§64 of Ch. 253 of Gen. Laws as added by Laws of 1936 (S. B. No. 224)
South Carolina	1932 Code, §8253; Acts 1932, No. 871, §2o	Acts 1932, No. 871, §2q	Acts 1932, No. 871, §2m	Code 1932, §8253; Acts 1932, No. 871, §4a-4f; Acts 1934, No. 907	Acts 1932, No. 871, §2r
South Dakota				Comp. L. 1929, §6169, subd. 18*	

COMMISSIONS AND MUNICIPALITIES OVER VARIOUS COMPANIES AND THEIR HOLDING COMPANIES

Banking Transactions with Affiliated Interests	Acquisition of Utility Stocks by Holding Companies	Consolidation of Utility Properties by Merger, Consolidation or Purchase	Certificate of Convenience and Necessity	Dividends	Sale of Assets
Con. Stats. 1919, Ch. 21, as amended by L. 1931, Ch. 455, §1; L. 1933, Ch. 307, §17	Con. Stats. 1919, Ch. 21, §1037(e) as added by L. 1931, Ch. 455		Con. Stats. 1919, Ch. 21, §1037(e) as added by L. 1931, Ch. 455		
	1913-25 Supp. to Comp. Laws, Ch. 13b, §4609c22	1913-25 Supp. to Comp. Laws, Ch. 13b, §4609c21	L. 1929, Ch. 198		1913-25 Supp. to Comp. Laws, Ch. 13b, §4609c21
		Throckmorton's Ann. Code (1936), §614-60		Throckmorton's Ann. Code (1936), §614-58	Throckmorton's Ann. Code (1936), §614-60
L. 1933, Ch. 441, §§1-9 (incl.)	L. 1933, Ch. 441, §§7-9 (incl.)	L. 1933, Ch. 441, §§4-9 (incl.)	L. 1931, Ch. 199		Laws of 1933, Chap. 441, §4.
Acts 1937, No. 286, §§701-2	Acts 1937, No. 286, §202	Acts 1937, No. 286, §202	Acts 1937, No. 286, §§201-3		Acts 1937, No. 286, §202
§64 of Ch. 253 of Gen. Laws as added by Laws of 1936 (S. B. No. 244)	§63 of Ch. 253 of Gen. Laws as added by Laws of 1936 (S. B. No. 224)	§63 of Ch. 253 of Gen. Laws as added by Laws of 1936 (S. B. No. 224)	G. L. 1923, Ch. 253, §59 as added by L. 1926, Ch. 767	Chap. 253, Sec. 62 of Gen. Laws as added by Laws of 1936 (S. B. No. 224).	Chap. 253, §63 of Gen. Laws as added by Laws of 1936 (S. B. No. 224).
		Act 1932, No. 871, §21	Acts 1932, No. 871, §2w		Acts 1932, No. 871, §21

PRESENT EXTENT OF REGULATORY POWER OF STATE
ASPECTS OF OPERATIONS OF ELECTRIC UTILITY

State	Accounting	Depreciation	Issuance and Sale of Securities	Rates and Service	Contracts with Affiliated Interests
Tennessee	Code 1932, §5451	Code 1932, §5451	Code 1932, §5452	Code 1932, §5450	
Texas				Vernon's Tex. Stat. 1936, Title 28, Arts. 1119-1132 (incl.), as amended by Laws 1937 (H.B. No. 131)*	
Utah	Rev. Stats. 1933, §§76-4-22, 76-4-23	Rev. Stats. 1933, §76-4-23		Rev. Stats. 1933, §§76-3-1 to 76-4-21 (incl.)	Rev. Stats. 1933, §76-4-28
Vermont	Pub. L. 1933, §6096		Pub. L. 1933, §§5953, 6091, 6106	Pub. L. 1933, §§6091, 6093, 6452	Pub. L. 1933 §6087. See note i
Virginia	Code 1936, §4070		Code 1936, §§4073(1)-4073(16)	Code 1936, §§4065a 4066, 4071, 4071a, 4072	Code 1936, §§3774c-h
Washington	Rem. Rev. Stats., §10416	Acts 1933, Ch. 165, §13 (Rem. Rev. Stats., §10458-7)	Acts 1933, Ch. 151 (Rem. Rev. Stats., §10439)	Rem. Rev. Stats., §10390	Acts 1933, Ch. 152 §§2, 3 (Rem. Rev Stats., §10440)
West Virginia	Code 1931, Ch. 24, Art. 2, §8			Code 1931, Ch. 24, Art. 2, §§2 (as amended by Ch. 115 of Acts of '35), 3, 4	Ch. 24, Art. 3, §12 of Code as added by Ch. 115 of Acts of '35
Wisconsin	Stats., §196.06	Stats., §196.09	Stats., §§184.01 to 184.14 (incl.) as amended by L. 1931, Ch. 183, §1	Stats., §§196.03 to 196.48 (incl.)	
Wyoming	Rev. Stats. 1931, §94-144			Rev. Stats. 1931, §§94-116, 94-117, 94-120	Rev. Stats. 1931 §94-137. See note

FOOTNOTES:

* Municipal regulation.

a. Where right to regulate is reserved by franchise; regulatory power also exercised under special municipal charters, e. g. Miami. Also see Laws of 1937 (H. B. No. 1728) giving Town of Macclenny power to regulate rates.

b. In addition, Railroad Commission has certain powers with respect to transmission lines.

c. Loans must be approved.

d. In addition, Railroad and Warehouse Commission has certain powers with respect to transmission lines.

e. When combination effected by acquisition of stock.

COMMISSIONS AND MUNICIPALITIES OVER VARIOUS COMPANIES AND THEIR HOLDING COMPANIES

Banking Transactions with Affiliated Interests	Acquisition of Utility Stocks by Holding Companies	Consolidation of Utility Properties by Merger, Consolidation or Purchase	Certificate of Convenience and Necessity	Dividends	Sale of Assets
		Code 1932, §5452	Code 1932, §5502		
	Laws of 1935, Ch. 68, §2	Laws of 1935, Ch. 68, §1	Rev. Stats. 1933, §§76-4-24	Laws of 1935, Chap. 67 (H. B. No. 68).	Laws of 1935, Chap. 68, §3
		Pub. L. 1933, §§5954, 6012 as amended by Laws of '35, No. 158, p. 162	Pub. L. 1933, §§6105; 5947-50, as amended by Laws 1937 (H. B. No. 106)		Pub. Laws 1933, §5954 as amended by Laws of 1935, No. 158, p. 162
Code 1936, §3774i					
Acts 1933, Ch. 152, §2 (Rem. Rev. Stats., §10440)				Acts of 1933, Chap. 165, §11 (Rem. Rev. Stats. §10458-5)	
Ch. 24, Art. 3 §12 of Code as added by Ch. 115 of Acts of 1935. See note h	Ch. 24, Art. 3 §12 of Code as added by Ch. 115 of Acts of '35	Ch. 24, Art. 3, §12 of Code as added by Ch. 115 of Acts of '35	Ch. 24, Art. 3, §11 of Code as added by Ch. 115 of Acts of '35		Code 1931, Ch. 24 Art. 3, §12, as amended by Ch. 115 of Acts of 1935
Laws of 1933, Ch. 440		Stats., §196.80	Stats., §§196.49 to 196-51 (incl.)		Stats. §196.80
			Rev. Stats. 1931, §94-145, as amended by Laws 1937 c. 28		

f. In addition, state commission has power to regulate charges, rates, services and facilities except in cities of 10,000 or more inhabitants.

g. Certificates not required in cities of 10,000 or more inhabitants—court has jurisdiction over issuance.

h. Contracts with affiliated interests for financial services subject to commission approval.

i. Filing only required.

j. Forbids service charges.

k. Forbids stock dividends.

Appendix C.

Public Utility Holding Company Act of 1935.

[PUBLIC—No. 333—74TH CONGRESS]

[S. 2796]

AN ACT

To provide for control and regulation of public-utility holding companies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public Utility Act of 1935".

TITLE I—CONTROL OF PUBLIC-UTILITY HOLDING COMPANIES

NECESSITY FOR CONTROL OF HOLDING COMPANIES

SECTION 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, divi-

dend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

DEFINITIONS

SEC. 2. (a) When used in this title, unless the context otherwise requires—

(1) "Person" means an individual, or company.

(2) "Company" means a corporation, a partnership, an association, a joint-stock company, a business trust, or an organized group of persons, whether incorporated or not; or any receiver, trustee, or other liquidating agent of any of the foregoing in his capacity as such.

(3) "Electric utility company" means any company which owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale, other than sale to tenants or employees of the company operating such facilities for their own use and not for resale. The Commission, upon application, shall by order declare a company operating any such facilities not to be an electric utility company if the Commission finds that (A) such company is primarily engaged in one or more businesses other than the business of an electric utility company, and by reason of the small amount of electric energy sold by such company it is not necessary in the public interest or for the protection of investors or consumers that such company be considered an electric utility company for the purposes of this title, or (B) such company is one operating within a single State, and substantially all of its outstanding securities are owned directly or indirectly by another company to which such operating company sells or furnishes electric energy which it generates; such other company uses and does not resell such electric energy, is engaged primarily in manufacturing (other than the manufacturing of electric energy or gas) and is not controlled by any other company; and by reason of the small amount of electric energy sold or furnished by such operating company to other persons it is not necessary in the public interest or for the protection of investors or consumers that it be considered an electric utility company for the purposes of this title. The filing of an application hereunder in good faith shall exempt such company (and the owner of the facilities operated by such company) from the application of this paragraph until the Commission has acted upon such application. As a condition to the entry of any such order, and as a part thereof, the Commission may require application to be made periodically for a renewal of such order, and may require the filing of such periodic or special reports regarding the business of the company as the Commission may find necessary or appropriate to insure that such company continues to be entitled to such exemption during the period for which such order is effective. The Commission, upon its own motion or upon application, shall revoke such order whenever it finds that the conditions specified in clause (A) or (B) are not satisfied in the case of such company. Any action of the Commission under the preceding sentence

shall be by order. Application under this paragraph may be made by the company in respect of which the order is to be issued or by the owner of the facilities operated by such company. Any order issued under this paragraph shall apply equally to such company and such owner. The Commission may by rules or regulations conditionally or unconditionally provide that any specified class or classes of companies which it determines to satisfy the conditions specified in clause (A) or (B), and the owners of the facilities operated by such companies, shall not be deemed electric utility companies within the meaning of this paragraph.

(4) "Gas utility company" means any company which owns or operates facilities used for the distribution at retail (other than distribution only in enclosed portable containers, or distribution to tenants or employees of the company operating such facilities for their own use and not for resale) of natural or manufactured gas for heat, light, or power. The Commission, upon application, shall by order declare a company operating any such facilities not to be a gas utility company if the Commission finds that (A) such company is primarily engaged in one or more businesses other than the business of a gas utility company, and (B) by reason of the small amount of natural or manufactured gas distributed at retail by such company it is not necessary in the public interest or for the protection of investors or consumers that such company be considered a gas utility company for the purposes of this title. The filing of an application hereunder in good faith shall exempt such company (and the owner of the facilities operated by such company) from the application of this paragraph until the Commission has acted upon such application. As a condition to the entry of any such order, and as a part thereof, the Commission may require application to be made periodically for a renewal of such order, and may require the filing of such periodic or special reports regarding the business of the company as the Commission may find necessary or appropriate to insure that such company continues to be entitled to such exemption during the period for which such order is effective. The Commission, upon its own motion or upon application, shall revoke such order whenever it finds that the conditions specified in clauses (A) and (B) are not satisfied in the case of such company. Any action of the Commission under the preceding sen-

tence shall be by order. Application under this paragraph may be made by the company in respect of which the order is to be issued or by the owner of the facilities operated by such company. Any order issued under this paragraph shall apply equally to such company and such owner. The Commission may by rules or regulations conditionally or unconditionally provide that any specified class or classes of companies which it determines to satisfy the conditions specified in clauses (A) and (B), and the owners of the facilities operated by such companies, shall not be deemed gas utility companies within the meaning of this paragraph.

(5) "Public-utility company" means an electric utility company or a gas utility company.

(6) "Commission" means the Securities and Exchange Commission.

(7) "Holding company" means—

(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B), unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; and

(B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon holding companies.

The Commission, upon application, shall by order declare that a company is not a holding company under clause (A) if the Commission finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more other persons, directly or indirectly control a public-utility or holding company either through

one or more intermediary persons or by any means or device whatsoever, (ii) is not an intermediary company through which such control is exercised, and (iii) does not, directly or indirectly, exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon holding companies. The filing of an application hereunder in good faith by a company other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company, until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of any order granting such application and as a part of any such order, the Commission may require the applicant to apply periodically for a renewal of such order and to do or refrain from doing such acts or things, in respect of exercise of voting rights, control over proxies, designation of officers and directors, existence of interlocking officers, directors and other relationships, and submission of periodic or special reports regarding affiliations or intercorporate relationships of the applicant, as the Commission may find necessary or appropriate to ensure that in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application of the company affected, shall revoke the order declaring such company not to be a holding company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order.

(8) "Subsidiary company" of a specified holding company means—

(A) any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company (or by a company that is a subsidiary company of such holding company by virtue of this clause or clause (B)), unless the Commission, as hereinafter provided, by order declares such company not to be a subsidiary company of such holding company; and

(B) any person the management or policies of which the Commission, after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies.

The Commission, upon application, shall by order declare that a company is not a subsidiary company of a specified holding company under clause (A) if the Commission finds that (i) the applicant is not controlled, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever, (ii) the applicant is not an intermediary company through which such control of another company is exercised, and (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies. The filing of an application hereunder in good faith shall exempt the applicant from any obligation, duty, or liability

imposed in this title upon the applicant as a subsidiary company of such specified holding company until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of, and as a part of, any order granting such application, the Commission may require the applicant to apply periodically for a renewal of such order and to file such periodic or special reports regarding the affiliations or intercorporate relationships of the applicant as the Commission may find necessary or appropriate to enable it to determine whether in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application, shall revoke the order declaring such company not to be a subsidiary company whenever in its judgment any conditions specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order. Any application under this paragraph may be made by the holding company or the company in respect of which the order is to be entered, but as used in this paragraph the term "applicant" means only the company in respect of which the order is to be entered.

(9) "Holding-company system" means any holding company, together with all its subsidiary companies, and all mutual service companies (as defined in paragraph (13) of this subsection) of which such holding company or any subsidiary company thereof is a member company (as defined in paragraph (14) of this subsection).

(10) "Associate company" of a company means any company in the same holding-company system with such company.

(11) "Affiliate" of a specified company means—

(A) any person that directly or indirectly owns, controls, or holds with power to vote, 5 per centum or more of the outstanding voting securities of such specified company;

(B) any company 5 per centum or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by such specified company;

(C) any individual who is an officer or director of such specified company, or of any company which is an affiliate thereof under clause (A) of this paragraph; and

(D) any person or class of persons that the Commission determines after appropriate notice and opportunity for hearing, to stand in such relation to such specified company that there is liable to be such an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon affiliates of a company.

(12) "Registered holding company" means a person whose registration is in effect under section 5.

(13) "Mutual service company" means a company approved as a mutual service company under section 13.

(14) "Member company" means a company which is a member of an association or group of companies mutually served by a mutual service company.

(15) "Director" means any director of a corporation or any individual who performs similar functions in respect of any company.

(16) "Security" means any note, draft, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, receiver's or trustee's

certificate, or, in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, assumption of liability on, or warrant or right to subscribe to or purchase, any of the foregoing.

(17) "Voting security" means any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company, or any security issued under or pursuant to any trust, agreement, or arrangement whereby a trustee or trustees or agent or agents for the owner or holder of such security are presently entitled to vote in the direction or management of the affairs of a company; and a specified per centum of the outstanding voting securities of a company means such amount of the outstanding voting securities of such company as entitles the holder or holders thereof to cast said specified per centum of the aggregate votes which the holders of all the outstanding voting securities of such company are entitled to cast in the direction or management of the affairs of such company.

(18) "Utility assets" means the facilities, in place, of any electric utility company or gas utility company for the production, transmission, transportation, or distribution of electric energy or natural or manufactured gas.

(19) "Service contract" means any contract, agreement, or understanding whereby a person undertakes to sell or furnish, for a charge, any managerial, financial, legal, engineering, purchasing, marketing, auditing, statistical, advertising, publicity, tax, research, or any other service, information, or data.

(20) "Sales contract" means any contract, agreement, or understanding whereby a person undertakes to sell, lease, or furnish, for a charge, any goods, equipment, materials, supplies, appliances, or similar property. As used in this paragraph the term "property" does not include electric energy or natural or manufactured gas.

(21) "Construction contract" means any contract, agreement, or understanding for the construction, extension, improvement, maintenance, or repair of the facilities or any part thereof of a company for a charge.

(22) "Buy", "acquire", "acquisition", or "purchase" includes any purchase, acquisition by lease, exchange, merger, consolidation, or other acquisition.

(23) "Sale" or "sell" includes any sale, disposition by lease, exchange or pledge, or other disposition.

(24) "State" means any State of the United States or the District of Columbia.

(25) "United States", when used in a geographical sense, means the States.

(26) "State commission" means any commission, board, agency, or officer, by whatever name designated, of a State, municipality, or other political subdivision of a State which under the law of such State has jurisdiction to regulate public-utility companies.

(27) "State securities commission" means any commission, board, agency, or officer, by whatever name designated, other than a State commission as defined in paragraph (26) of this subsection, which under the law of a State has jurisdiction to regulate, approve, or control the issue or sale of a security by a company.

(28) "Interstate commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(29) "Integrated public-utility system" means—

(A) As applied to electric utility companies, a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation; and

(B) As applied to gas utility companies, a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation: *Provided,* That gas utility companies deriving natural gas from a common source of supply may be deemed to be included in a single area or region.

(b) No person shall be deemed to be a holding company under clause (B) of paragraph (7) of subsection (a), or a subsidiary company under clause (B) of paragraph (8) of such subsection, or an affiliate under clause (D) of paragraph (11) of such subsection, unless the Commission, after appropriate notice and opportunity for hearing, has issued an order declaring such person to be a holding company, a subsidiary company, or an affiliate, or declaring a class of which such person is a member to be affiliates. Such an order shall not become effective for at least thirty days after the mailing of a copy thereof to the person thereby declared to be a holding company, subsidiary company, or affiliate; or, in the case of determination of affiliates by classes, until at least thirty days after appropriate publication thereof in such manner as the Commission shall determine. Whenever the Commission, on its own motion or upon application by the person declared to be a holding company, subsidiary company, or affiliate, finds that the circumstances which gave rise to the issuance of any such order no longer exist, the Commission shall by order revoke such order.

(c) No provision in this title shall apply to, or be deemed to include, the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned directly or indirectly by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

POWER TO MAKE PARTICULAR EXEMPTIONS REGARDING HOLDING COMPANIES, SUBSIDIARY COMPANIES, AND AFFILIATES

SEC. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

(1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized;

(2) such holding company is predominantly a public-utility company whose operations as such do not extend beyond the State in which it is organized and States contiguous thereto;

(3) such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company and (A) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public-utility company, or (B) deriving a material part of its income from any one or more such subsidiary companies, if substantially all the outstanding securities of such companies are owned, directly or indirectly, by such holding company;

(4) such holding company is temporarily a holding company solely by reason of the acquisition of securities for purposes of liquidation or distribution in connection with a bona fide debt previously contracted or in connection with a bona fide arrangement for the underwriting or distribution of securities; or

(5) such holding company is not, and derives no material part of its income, directly or indirectly, from

any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

(b) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any subsidiary company, as such, of a holding company from any provision or provisions of this title, the application of which to such subsidiary company the Commission finds is not necessary in the public interest or for the protection of investors, if such subsidiary company derives no material part of its income, directly or indirectly, from sources within the United States, and neither it nor any of its subsidiary companies is a public-utility company operating in the United States.

(c) Within a reasonable time after the receipt of an application for exemption under subsection (a) or (b), the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. The filing of an application in good faith under subsection (a) by a person other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company until the Commission has acted upon such application. The filing of an application in good faith under subsection (b) shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company until the Commission has acted upon such application. Whenever the Commission, on its own motion, or upon application by the holding company or any subsidiary company thereof exempted by any order issued under subsection (a), or by the subsidiary company exempted by any order issued under subsection (b), finds that the circumstances which gave rise to the issuance of such order no longer exist, the Commission shall by order revoke such order.

(d) The Commission may, by rules and regulations, conditionally or unconditionally exempt any specified class or classes of persons from the obligations, duties, or liabilities imposed upon such persons as subsidiary companies or affiliates under any provision or provisions of this title, and may provide within the extent of any such exemption that

such specified class or classes of persons shall not be deemed subsidiary companies or affiliates within the meaning of any such provision or provisions, if and to the extent that it deems the exemption necessary or appropriate in the public interest or for the protection of investors or consumers and not contrary to the purposes of this title.

TRANSACTIONS BY UNREGISTERED HOLDING COMPANIES

SEC. 4. (a) After December 1, 1935, unless a holding company is registered under section 5, it shall be unlawful for such holding company, directly or indirectly—

(1) to sell, transport, transmit, or distribute, or own or operate any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce;

(2) by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company;

(3) to distribute or make any public offering for sale or exchange of any security of such holding company, any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or to sell any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering;

(4) by use of the mails or any means or instrumentality of interstate commerce, to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company;

(5) to engage in any business in interstate commerce; or

(6) to own, control, or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs (1) to (5), inclusive, of this subsection.

(b) Every holding company which has outstanding any security any of which, by use of the mails or any means or instrumentality of interstate commerce, has been distributed or made the subject of a public offering subsequent to January 1, 1925, and any of which security is owned or held on October 1, 1935 (or, if such company is not a holding company on that date, on the date such company becomes a holding company) by persons not resident in the State in which such holding company is organized, shall register under section 5 on or before December 1, 1935 or the thirtieth day after such company becomes a holding company, whichever date is later.

REGISTRATION OF HOLDING COMPANIES

SEC. 5. (a) On or at any time after October 1, 1935, any holding company or any person purposing to become a holding company may register by filing with the Commission a notification of registration, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. A person shall be deemed to be registered upon receipt by the Commission of such notification of registration.

(b) It shall be the duty of every registered holding company to file with the Commission, within such reasonable time after registration as the Commission shall fix by rules and regulations or order, a registration statement in such form as the Commission shall by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. Such registration statement shall include—

(1) such copies of the charter or articles of incorporation, partnership, or agreement, with all amendments thereto, and the bylaws, trust indentures, mortgages, underwriting arrangements, voting-trust agreements, and similar documents, by whatever name known, of or relating to the registrant or any of its

associate companies as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers;

(2) such information in such form and in such detail relating to, and copies of such documents of or relating to, the registrant and its associate companies as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers in respect of—

(A) the organization and financial structure of such companies and the nature of their business;

(B) the terms, position, rights, and privileges of the different classes of their securities outstanding;

(C) the terms and underwriting arrangements under which their securities, during not more than the five preceding years, have been offered to the public or otherwise disposed of and the relations of underwriters to, and their interest in, such companies;

(D) the directors and officers of such companies, their remuneration, their interest in the securities of, their material contracts with, and their borrowings from, any of such companies;

(E) bonus and profit-sharing arrangements;

(F) material contracts, not made in the ordinary course of business, and service, sales, and construction contracts;

(G) options in respect of securities;

(H) balance sheets for not more than the five preceding fiscal years, certified, if required by the rules and regulations of the Commission, by an independent public accountant;

(I) profit and loss statements for not more than the five preceding fiscal years, certified, if required by the rules and regulations of the Commission, by an independent public accountant;

(3) such further information or documents regarding the registrant or its associate companies or the relations between them as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

(c) The Commission by such rules and regulations or order as it deems necessary or appropriate in the public interest or for the protection of investors or consumers, may permit a registrant to file a preliminary registration statement without complying with the provisions of subsection (b); but every registrant shall file a complete registration statement with the Commission within such reasonable period of time as the Commission shall fix by rules and regulations or order, but not later than one year after the date of registration.

(d) Whenever the Commission, upon application, finds that a registered holding company has ceased to be a holding company, it shall so declare by order and upon the taking effect of such order the registration of such company shall, upon such terms and conditions as the Commission finds and in such order prescribes as necessary for the protection of investors, cease to be in effect. The denial of any such application by the Commission shall be by order.

UNLAWFUL SECURITY TRANSACTIONS BY REGISTERED HOLDING AND SUBSIDIARY COMPANIES

SEC. 6. (a) Except in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company.

(b) The provisions of subsection (a) shall not apply to the issue, renewal, or guaranty by a registered holding company or subsidiary company thereof of a note or draft (including the pledge of any security as collateral therefor)

if such note or draft (1) is not part of a public offering, (2) matures or is renewed for not more than nine months, exclusive of days of grace, after the date of such issue, renewal, or guaranty thereof, and (3) aggregates (together with all other then outstanding notes and drafts of a maturity of nine months or less, exclusive of days of grace, as to which such company is primarily or secondarily liable) not more than 5 per centum of the principal amount and par value of the other securities of such company then outstanding, or such greater per centum thereof as the Commission upon application may by order authorize as necessary or appropriate in the public interest or for the protection of investors or consumers. In the case of securities having no principal amount or no par value, the value for the purposes of this subsection shall be the fair market value as of the date of issue. The Commission by rules and regulations or order, subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers, shall exempt from the provisions of subsection (a) the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the State commission of the State in which such subsidiary company is organized and doing business, or if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company when such subsidiary company is not a holding company, a public-utility company, an investment company, or a fiscal or financing agency of a holding company, a public utility company, or an investment company. The provisions of subsection (a) shall not apply to the issue, by a registered holding company or subsidiary company thereof, of a security issued pursuant to the terms of any security outstanding on January 1, 1935, giving the holder of such outstanding security the right to convert such outstanding security into another security of the same issuer or of another person, or giving the right to subscribe to another security of the same issuer or another issuer. Within ten days after any issue, sale, renewal, or guaranty exempted from the application of subsection (a) by or under authority of this subsection, such holding company or subsidiary company thereof shall file with the Commission a certificate of notification in such

form and setting forth such of the information required in a declaration under section 7 as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

(c) It shall be unlawful, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, for any registered holding company or any subsidiary company thereof, directly or indirectly,—

(1) to sell or offer for sale or to cause to be sold or offered for sale, from house to house, any security of such holding company; or

(2) to cause any officer or employee of any subsidiary company of such holding company to sell or cause to be sold any security of such holding company.

As used in this subsection the term "house" shall not include an office used for business purposes.

DECLARATIONS BY REGISTERED HOLDING AND SUBSIDIARY COMPANIES IN RESPECT OF SECURITY TRANSACTIONS

SEC. 7. (a) A registered holding company or subsidiary company thereof may file a declaration with the Commission, regarding any of the acts enumerated in subsection (a) of section 6, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. Such declaration shall include—

(1) such of the information and documents which are required to be filed in order to register a security under section 7 of the Securities Act of 1933, as amended, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(2) such additional information, in such form and detail, and such documents regarding the declarant or any associate company thereof, the particular security and compliance with such State laws as may apply to the act in question as the Commission may by rules and

regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

(b) A declaration filed under this section shall become effective within such reasonable period of time after the filing thereof as the Commission shall fix by rules and regulations or order, unless the Commission prior to the expiration of such period shall have issued an order to the declarant to show cause why such declaration should become effective. Within a reasonable time after an opportunity for hearing upon an order to show cause under this subsection, unless the declarant shall withdraw its declaration, the Commission shall enter an order either permitting such declaration to become effective as filed or amended, or refusing to permit such declaration to become effective. Amendments to a declaration may be made upon such terms and conditions as the Commission may prescribe.

(c) The Commission shall not permit a declaration regarding the issue or sale of a security to become effective unless it finds that—

(1) such security is (A) a common stock having a par value and being without preference as to dividends or distribution over, and having at least equal voting rights with, any outstanding security of the declarant; (B) a bond (i) secured by a first lien on physical property of the declarant, or (ii) secured by an obligation of a subsidiary company of the declarant secured by a first lien on physical property of such subsidiary company, or (iii) secured by any other assets of the type and character which the Commission by rules and regulations or order may prescribe as appropriate in the public interest or for the protection of investors; (C) a guaranty of, or assumption of liability on, a security of another company; or (D) a receiver's or trustee's certificate duly authorized by the appropriate court or courts; or

(2) such security is to be issued or sold solely (A) for the purpose of refunding, extending, exchanging, or discharging an outstanding security of the declarant and/or a predecessor company thereof or for the purpose of effecting a merger, consolidation, or other re-

organization; (B) for the purpose of financing the business of the declarant as a public-utility company; (C) for the purpose of financing the business of the declarant, when the declarant is neither a holding company nor a public-utility company; and/or (D) for necessary and urgent corporate purposes of the declarant where the requirements of the provisions of paragraph (1) would impose an unreasonable financial burden upon the declarant and are not necessary or appropriate in the public interest or for the protection of investors or consumers; or

(3) such security is one the issuance of which was authorized by the company prior to January 1, 1935, and which the Commission by rules and regulations or order authorizes as necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) If the requirements of subsections (c) and (g) are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding-company system;

(2) the security is not reasonably adapted to the earning power of the declarant;

(3) financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;

(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;

(5) in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant; or

(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers.

(e) If the requirements of subsection (g) are satisfied, the Commission shall permit a declaration to become effective regarding the exercise of a privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security unless the Commission finds that such exercise of such privilege or right will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant or is otherwise detrimental to the public interest or the interest of investors or consumers.

(f) Any order permitting a declaration to become effective may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section.

(g) If a State commission or State securities commission, having jurisdiction over any of the acts enumerated in subsection (a) of section 6, shall inform the Commission, upon request by the Commission for an opinion or otherwise, that State laws applicable to the act in question have not been complied with, the Commission shall not permit a declaration regarding the act in question to become effective until and unless the Commission is satisfied that such compliance has been effected.

ACQUIRING INTEREST IN ELECTRIC AND GAS UTILITY COMPANIES SERVING SAME TERRITORY

SEC. 8. Whenever a State law prohibits, or requires approval or authorization of, the ownership or operation by a single company of the utility assets of an electric utility company and a gas utility company serving substantially the same territory, it shall be unlawful for a registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise,—

(1) to take any step, without the express approval of the State commission of such State, which results in its having a direct or indirect interest in an electric

utility company and a gas utility company serving substantially the same territory; or

(2) if it already has any such interest, to acquire, without the express approval of the State commission, any direct or indirect interest in an electric utility company or gas utility company serving substantially the same territory as that served by such companies in which it already has an interest.

ACQUISITION OF SECURITIES AND UTILITY ASSETS AND OTHER INTERESTS

SEC. 9. (a) Unless the acquisition has been approved by the Commission under section 10, it shall be unlawful—

(1) for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to acquire, directly or indirectly, any securities or utility assets or any other interest in any business;

(2) for any person, by use of the mails or any means or instrumentality of interstate commerce, to acquire, directly or indirectly, any security of any public-utility company, if such person is an affiliate, under clause (A) of paragraph (11) of subsection (a) of section 2, of such company and of any other public utility or holding company, or will by virtue of such acquisition become such an affiliate.

(b) Subsection (a) shall not apply to—

(1) the acquisition by a public-utility company of utility assets the acquisition of which has been expressly authorized by a State commission; or

(2) the acquisition by a public-utility company of securities of a subsidiary public-utility company thereof, provided that both such public-utility companies and all other public-utility companies in the same holding company system are organized in the same State, that the business of each such company in such system is substantially confined to such State, and that the acquisition of such securities has been expressly authorized by the State commission of such State.

(c) Subsection (a) shall not apply to the acquisition by a registered holding company, or a subsidiary company thereof, of—

(1) securities of, or securities the principal or interest of which is guaranteed by, the United States, a State, or political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing;

(2) such other readily marketable securities, within the limitation of such amounts, as the Commission may by rules and regulations prescribe as appropriate for investment of current funds and as not detrimental to the public interest or the interest of investors or consumers; or

(3) such commercial paper and other securities, within such limitations, as the Commission may by rules and regulations or order prescribe as appropriate in the ordinary course of business of a registered holding company or subsidiary company thereof and as not detrimental to the public interest or the interest of investors or consumers.

APPROVAL OF ACQUISITION OF SECURITIES AND UTILITY ASSETS AND OTHER INTERESTS

SEC. 10. (a) A person may apply for approval of the acquisition of securities or utility assets, or of any other interest in any business, by filing an application in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors and consumers. Such application shall include—

(1) in the case of the acquisition of securities, such information and copies of such documents as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers in respect of—

(A) the security to be acquired, the consideration to be paid therefor, and compliance with such State

laws as may apply in respect of the issue, sale, or acquisition thereof,

(B) the outstanding securities of the company whose security is to be acquired, the terms, position, rights, and privileges of each class and the options in respect of any such securities,

(C) the names of all security holders of record (or otherwise known to the applicant) owning, holding, or controlling 1 per centum or more of any class of security of such company, the officers and directors of such company, and their remuneration, security holdings in, material contracts with, and borrowings from such company and the offices or directorships held, and securities owned, held, or controlled, by them in other companies.

(D) the bonus, profit-sharing and voting-trust agreements, underwriting arrangements, trust indentures, mortgages, and similar documents, by whatever name known, of or relating to such company,

(E) the material contracts, not made in the ordinary course of business, and the service, sales, and construction contracts of such company,

(F) the securities owned, held, or controlled directly or indirectly, by such company,

(G) balance sheets and profit and loss statements of such company for not more than the five preceding fiscal years, certified, if required by the rules and regulations of the Commission by an independent public accountant,

(H) any further information regarding such company and any associate company or affiliate thereof, or its relations with the applicant company, and

(I) if the applicant be not a registered holding company, any of the information and documents which may be required under section 5 from a registered holding company;

(2) in the case of the acquisition of utility assets, such information concerning such assets, the value

thereof and consideration to be paid therefor, the owner or owners thereof and their relation to, agreements with, and interest in the securities of, the applicant or any associate company thereof as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(3) in the case of the acquisition of any other interest in any business, such information concerning such business and the interest to be acquired, and the consideration to be paid, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

(b) If the requirements of subsection (f) are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

(1) such acquisition will tend towards interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers;

(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; or

(3) such acquisition will unduly complicate the capital structure of the holding-company system of the applicant or will be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding-company system.

The Commission may condition its approval of the acquisition of securities of another company upon such a fair offer to purchase such of the other securities of the company whose security is to be acquired as the Commission

may find necessary or appropriate in the public interest or for the protection of investors or consumers.

(c) Notwithstanding the provisions of subsection (b), the Commission shall not approve—

(1) an acquisition of securities or utility assets, or of any other interest, which is unlawful under the provisions of section 8 or is detrimental to the carrying out of the provisions of section 11; or

(2) the acquisition of securities or utility assets of a public-utility or holding company unless the Commission finds that such acquisition will serve the public interest by tending towards the economical and efficient development of an integrated public-utility system. This paragraph shall not apply to the acquisition of securities or utility assets of a public-utility company operating exclusively outside the United States.

(d) Within such reasonable time after the filing of an application under this section as the Commission shall fix by rules and regulations or order, the Commission shall enter an order either granting or, after notice and opportunity for hearing, denying approval of the acquisition unless the applicant shall withdraw its application. Amendments to an application may be made upon such terms and conditions as the Commission may prescribe.

(e) The Commission, in any order approving the acquisition of securities or utility assets, may prescribe such terms and conditions in respect of such acquisition, including the price to be paid for such securities or utility assets, as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

(f) The Commission shall not approve any acquisition as to which an application is made under this section unless it appears to the satisfaction of the Commission that such State laws as may apply in respect of such acquisition have been complied with, except where the Commission finds that compliance with such State laws would be detrimental to the carrying out of the provisions of section 11.

SIMPLIFICATION OF HOLDING-COMPANY SYSTEMS

SEC. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so

large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order

made under this subsection shall be subject to judicial review as provided in section 24.

(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may,

at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company

or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

(g) It shall be unlawful for any person to solicit or permit the use of his or its name to solicit, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, any proxy, consent, authorization, power of attorney, deposit, or dissent in respect of any reorganization plan of a registered holding company or any subsidiary company thereof under this section, or otherwise, or in respect of any plan under this section for the divestment of control, securities, or other assets, or for the dissolution of any registered holding company or any subsidiary company thereof, unless—

(1) the plan has been proposed by the Commission, or the plan and such information regarding it and its sponsors as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers has been submitted to the Commission by a person having a bona fide interest (as defined by the rules and regulations of the Commission) in such reorganization;

(2) each such solicitation is accompanied or preceded by a copy of a report on the plan which shall be made by the Commission after an opportunity for a hearing on the plan and other plans submitted to it,

or by an abstract of such report made or approved by the Commission; and

(3) each such solicitation is made not in contravention of such rules and regulations or orders as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers.

Nothing in this subsection or the rules and regulations thereunder shall prevent any person from appearing before the Commission or any court through an attorney or proxy.

INTERCOMPANY LOANS; DIVIDENDS; SECURITY TRANSACTIONS; SALE OF UTILITY ASSETS; PROXIES; OTHER TRANSACTIONS

SEC. 12. (a) It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly, to borrow, or to receive any extension of credit or indemnity, from any public-utility company in the same holding-company system or from any subsidiary company of such holding company, but it shall not be unlawful under this subsection to renew, or extend the time of, any loan, credit, or indemnity outstanding on the date of the enactment of this title.

(b) It shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly, to lend or in any manner extend its credit to or indemnify any company in the same holding-company system in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

(c) It shall be unlawful for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to declare or pay any dividend on any security of such company or to acquire, retire, or redeem any security of such company, in contravention of such

rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding-company systems, to safeguard the working capital of public-utility companies, to prevent the payment of dividends out of capital or unearned surplus, or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

(d) It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to sell any security which it owns of any public-utility company, or any utility assets, in contravention of such rules and regulations or orders regarding the consideration to be received for such sale, maintenance of competitive conditions, fees and commissions, accounts, disclosure of interest, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

(e) It shall be unlawful for any person to solicit or to permit the use of his or its name to solicit, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, any proxy, power of attorney, consent, or authorization regarding any security of a registered holding company or a subsidiary company thereof in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

(f) It shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to negotiate, enter into, or take any step in the performance of any transaction not otherwise unlawful under this title, with any company in the same holding-company system or with any affiliate of a company in such holding-company system in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters as the

Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules and regulations thereunder.

(g) It shall be unlawful for any affiliate of any public-utility company, by use of the mails or any means or instrumentality of interstate commerce, or for any affiliate of any public-utility company engaged in interstate commerce, or of any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to negotiate, enter into, or take any step in the performance of any transaction not otherwise unlawful under this title, with any such company of which it is an affiliate, in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters as the Commission deems necessary or appropriate to prevent the circumvention of the provisions of this title.

(h) It shall be unlawful for any registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly—

(1) to make any contribution whatsoever in connection with the candidacy, nomination, election or appointment of any person for or to any office or position in the Government of the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing; or

(2) to make any contribution to or in support of any political party or any committee or agency thereof.

The term "contribution" as used in this subsection includes any gift, subscription, loan, advance, or deposit of money or anything of value, and includes any contract, agreement, or promise, whether or not legally enforceable, to make a contribution.

(i) It shall be unlawful for any person employed or retained by any registered holding company, or any sub-

sidiary company thereof, to present, advocate, or oppose any matter affecting any registered holding company or any subsidiary company thereof, before the Congress or any Member or committee thereof, or before the Commission or Federal Power Commission, or any member, officer, or employee of either such Commission, unless such person shall file with the Commission in such form and detail and at such time as the Commission shall by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers, a statement of the subject matter in respect of which such person is retained or employed, the nature and character of such retainer or employment, and the amount of compensation received or to be received by such person, directly or indirectly, in connection therewith. It shall be the duty of every such person so employed or retained to file with the Commission within ten days after the close of each calendar month during such retainer or employment, in such form and detail as the Commission shall by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers, a statement of the expenses incurred and the compensation received by such person during such month in connection with such retainer or employment.

SERVICE, SALES, AND CONSTRUCTION CONTRACTS

SEC. 13. (a) After April 1, 1936, it shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to enter into or take any step in the performance of any service, sales, or construction contract by which such company undertakes to perform services or construction work for, or sell goods to, any associate company thereof which is a public-utility or mutual service company. This provision shall not apply to such transactions, involving special or unusual circumstances or not in the ordinary course of business, as the Commission by rules and regulations or order may conditionally or unconditionally exempt as being necessary or appropriate in the public interest or for the protection of investors or consumers.

(b) After April 1, 1936, it shall be unlawful for any subsidiary company of any registered holding company

or for any mutual service company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to enter into or take any step in the performance of any service, sales, or construction contract by which such company undertakes to perform services or construction work for, or sell goods to, any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions as the Commission by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies. This provision shall not apply to such transactions as the Commission by rules and regulations or order may conditionally or unconditionally exempt as being necessary or appropriate in the public interest or for the protection of investors or consumers, if such transactions (1) are with any associate company which does not derive, directly or indirectly, any material part of its income from sources within the United States and which is not a public-utility company operating within the United States, or (2) involve special or unusual circumstances or are not in the ordinary course of business.

(c) The rules and regulations and orders of the Commission under this section may prescribe, among other things, such terms and conditions regarding the determination of costs and the allocation thereof among specified classes of companies and for specified classes of service, sales, and construction contracts, the duration of such contracts, the making and keeping of accounts and cost-accounting procedures, the filing of annual and other periodic and special reports, the maintenance of competitive conditions, the disclosure of interests, and similar matters, as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The rules and regulations and orders of the Commission under this section shall prescribe, among other things, such terms and conditions regarding the manner in which application may be made for approval as a mutual

service company and the granting and continuance of such approval, the nature and enforcement of agreements for the sharing of expenses and distributing of revenues among member companies, and matters relating to such agreements, the nature and types of businesses and transactions in which mutual service companies may engage, and the manner of engaging therein, and the relations and transactions with member companies and affiliates, as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers. The Commission shall not approve, or continue the approval of, any company as a mutual service company unless the Commission finds such company is so organized as to ownership, costs, revenues, and the sharing thereof as reasonably to insure the efficient and economical performance of service, sales, or construction contracts by such company for member companies at cost fairly and equitably allocated among such member companies, at a reasonable saving to member companies over the cost to such companies of comparable contracts performed by independent persons. The Commission, upon its own motion or at the request of a member company or a State commission, may, after notice and opportunity for hearing, by order require a reallocation or reapportionment of costs among member companies of a mutual service company if it finds the existing allocation inequitable and may require the elimination of a service or services to a member company which does not bear its fair proportion of costs or which, by reason of its size or other circumstances, does not require such service or services. The Commission, after notice and opportunity for hearing, by order shall revoke, suspend, or modify the approval given any mutual service company if it finds that such company has persistently violated any provision of this section or any rule, regulation, or order thereunder.

(e) It shall be unlawful for any affiliate of any public-utility company engaged in interstate commerce, or of any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to enter into or take any step in the performance of any service, sales, or construction contract, by which such affiliate undertakes to perform services or construction work for, or sell goods to, any such company of which it is an affiliate, in contra-

vention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters, as the Commission deems necessary or appropriate to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

(f) It shall be unlawful for any person whose principal business is the performance of service, sales, or construction contracts for public-utility or holding companies, by use of the mails or any means or instrumentality of interstate commerce, to enter into or take any step in the performance of any service, sales, or construction contract with any public-utility company, or for any such person, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to enter into or take any step in the performance of any service, sales, or construction contract with any public-utility company engaged in interstate commerce, or with any registered holding company or any subsidiary company of a registered holding company, in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

(g) The Commission, in order to obtain information to serve as a basis for recommending further legislation, shall from time to time conduct investigations regarding the making, performance, and costs of service, sales, and construction contracts with holding companies and subsidiary companies thereof and with public-utility companies, the economies resulting therefrom, and the desirability thereof. The Commission shall report to Congress, from time to time, the results of such investigations, together with such recommendations for legislation as it deems advisable. On the basis of such investigations the Commission shall classify the different types of such contracts and the work done thereunder, and shall make recommendations from time to time regarding the standards and scope of such contracts in relation to public-utility com-

panies of different kinds and sizes and the costs incurred thereunder and economies resulting therefrom. Such recommendations shall be made available to State Commissions, public-utility companies, and to the public in such form and at such reasonable charge as the Commission may prescribe.

PERIODIC AND OTHER REPORTS

SEC. 14. Every registered holding company and every mutual service company shall file with the Commission such annual, quarterly, and other periodic and special reports, the answers to such specific questions and the minutes of such directors', stockholders', and other meetings, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. Such reports, if required by the rules and regulations of the Commission, shall be certified by an independent public accountant, and shall be made and filed at such time and in such form and detail as the Commission shall prescribe. The Commission may require that there be included in reports filed with it such information and documents as it finds necessary or appropriate to keep reasonably current the information filed under section 5 or 13, and such further information concerning the financial conditions, security structure, security holdings, assets, and cost thereof, wherever determinable, and affiliations of the reporting company and the associate companies, member companies, and affiliates thereof as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers.

ACCOUNTS AND RECORDS

SEC. 15. (a) Every registered holding company and every subsidiary company thereof shall make, keep, and preserve for such periods, such accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or for the enforcement of the provisions of this title or the rules, regulations, or orders thereunder.

(b) Every affiliate of a registered holding company or of any subsidiary company thereof, or of any public-utility company engaged in interstate commerce or not so engaged, shall make, keep, and preserve for such periods, such accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records relating to any transaction of such affiliate which is subject to any provision of this title or any rule, regulation, or order thereunder, as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or for the enforcement of the provisions of this title or the rules, regulations, or orders thereunder.

(c) Every mutual service company, and every affiliate of a mutual service company as to any transaction of such affiliate which is subject to any provision of this title or any rule, regulation, or order thereunder, shall make, keep, and preserve for such periods, such accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records, as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or for the enforcement of the provisions of this title or the rules, regulations, or orders thereunder.

(d) Every person whose principal business is the performance of service, sales, or construction contracts for public-utility or holding companies shall make, keep, and preserve for such periods, such accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records, relating to any transaction by such person which is subject to any provision of this title or any rule, regulation, or order thereunder, as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or for the enforcement of the provisions of this title or the rules and regulations thereunder.

(e) After the Commission has prescribed the form and manner of making and keeping accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records to be kept by any person hereunder, it shall be unlawful for any such person to keep any accounts, cost-accounting procedures, correspondence, memoranda, papers, books, or other records other than those prescribed or such

as may be approved by the Commission, or to keep his or its accounts, cost-accounting procedures, correspondence, memoranda, papers, books, or other records in any manner other than that prescribed or approved by the Commission.

(f) All accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records kept or required to be kept by persons subject to any provision of this section shall be subject at any time and from time to time to such reasonable periodic, special, and other examinations by the Commission, or any member or representative thereof, as the Commission may prescribe. The Commission, after notice and opportunity for hearing, may prescribe the account or accounts in which particular outlays, receipts and other transactions shall be entered, charged, or credited and the manner in which such entry, charge, or credit shall be made, and may require an entry to be modified or supplemented so as properly to show the cost of any asset or any other cost.

(g) It shall be the duty of every registered holding company and of every subsidiary company thereof and of every affiliate of a company in so far as such affiliate is subject to any provision of this title or any rule, regulation, or order thereunder, to submit the accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records of such holding company, subsidiary company, or affiliate, as the case may be, to such examinations, in person or by duly appointed attorney, by the holder of any security of such holding company, subsidiary company, or affiliate, as the case may be, as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers.

(h) It shall be the duty of every mutual service company, and of every affiliate of a mutual service company, and of every person whose principal business is the performance of service, sales, or construction contracts for public-utility or holding companies, in so far as such affiliate or such person is subject to any provision of this title or any rule, regulation, or order thereunder, to submit the accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records of such mutual service company, affiliate, or person to such examinations, in person or by duly appointed attorney, by

member companies of such mutual service company and by public-utility or holding companies for which such person performs service, sales, or construction contracts as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers.

(i) The Commission, by such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors or consumers may prescribe for persons subject to the provisions of subsection (a), (b), (c), or (d) of this section uniform methods for keeping accounts required under any provision of this section, including, among other things, the manner in which the cost of all assets, whenever determinable, shall be shown, the methods of classifying and segregating accounts, and the manner in which cost-accounting procedures shall be maintained.

LIABILITY FOR MISLEADING STATEMENTS

SEC. 16. (a) Any person who shall make or cause to be made any statement in any application, report, registration statement, or document filed pursuant to any provision of this title, or any rule, regulation, or order thereunder, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact shall be liable in the same manner, to the same extent, and subject to the same limitations as provided in section 18 of the Securities Exchange Act of 1934 with respect to an application, report, or document filed pursuant to the Securities Exchange Act of 1934.

(b) The rights and remedies provided by this title, except as provided in section 17 (b), shall be in addition to any and all other rights and remedies that may exist under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, or otherwise at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.

OFFICERS, DIRECTORS, AND OTHER AFFILIATES

SEC. 17. (a) Every person who is an officer or director of a registered holding company shall file with the Commission in such form as the Commission shall prescribe (1) at the time of the registration of such holding company, or within ten days after such person becomes an officer or director, a statement of the securities of such registered holding company or any subsidiary company thereof of which he is, directly or indirectly, the beneficial owner, and (2) within ten days after the close of each calendar month thereafter, if there has been any change in such ownership during such month, a statement of such ownership as of the close of such calendar month and of the changes in such ownership that have occurred during such calendar month.

(b) For the purpose of preventing the unfair use of information which may have been obtained by any such officer or director by reason of his relationship to such registered holding company or any subsidiary company thereof, any profit realized by any such officer or director from any purchase and sale, or any sale and purchase, of any security of such registered holding company or any subsidiary company thereof within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the holding company or subsidiary company in respect of the security of which such profit was realized, irrespective of any intention on the part of such officer or director in entering into such transaction to hold the security purchased or not to repurchase the security sold for a period of more than six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the company entitled thereto or by the owner of any security of such company in the name and in the behalf of such company if such company shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not cover any transaction where such person was not an officer or director at the times of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by

rules and regulations may, as necessary or appropriate in the public interest or for the protection of investors or consumers, exempt as not comprehended within the purpose of this subsection. Nothing in this subsection shall be construed to give a remedy in the case of any transaction in respect of which a remedy is given under subsection (b) of section 16 of the Securities Exchange Act of 1934.

(c) After one year from the date of the enactment of this title, no registered holding company or any subsidiary company thereof shall have, as an officer or director thereof, any executive officer, director, partner, appointee, or representative of any bank, trust company, investment banker, or banking association or firm, or any executive officer, director, partner, appointee, or representative of any corporation a majority of whose stock, having the unrestricted right to vote for the election of directors, is owned by any bank, trust company, investment banker, or banking association or firm, except in such cases as rules and regulations prescribed by the Commission may permit as not adversely affecting the public interest or the interest of investors or consumers.

INVESTIGATIONS; INJUNCTIONS, ENFORCEMENT OF TITLE, AND PROSECUTION OF OFFENCES

SEC. 18. (a) The Commission, in its discretion, may investigate any facts, conditions, practices, or matters which it may deem necessary or appropriate to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation thereunder, or to aid in the enforcement of the provisions of this title, in the prescribing of rules and regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this title relates. The Commission may require or permit any person to file with it a statement in writing, under oath or otherwise as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish, or make available to State commissions, information concerning any such subject.

(b) The Commission upon its own motion or at the request of a State commission may investigate, or obtain any

information regarding the business, financial condition, or practices of any registered holding company or subsidiary company thereof or facts, conditions, practices, or matters affecting the relations between any such company and any other company or companies in the same holding-company system.

(c) For the purpose of any investigation or any other proceeding under this title, any member of the Commission, or any officer thereof designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

(d) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who, without just cause, shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(e) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this title.

(g) Upon application of the Commission, the district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this title or any rule, regulation, or order of the Commission thereunder.

HEARINGS BY COMMISSION

SEC. 19. Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before the Commission, the Commission, in accordance with such rules and regulations as it may prescribe, shall admit as a party any interested State, State commission, State securities commission, municipality, or other political subdivision of a State, and may admit as a party any representative of interested consumers or security holders, or any other person whose participation in the proceedings may be in the public interest or for the protection of investors or consumers.

RULES, REGULATIONS, AND ORDERS

SEC. 20. (a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this title, including rules and regulations defining accounting, technical, and trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which information required in any statement, declaration, application, report, or other document filed with the Commission shall be set forth, the items or details to be shown in balance sheets, profit and loss statements, and surplus accounts, the manner in which the cost of all assets, whenever determinable, shall be shown in regard to such statements, declarations, applications, reports, and other documents filed with the Commission, or accounts required to be kept by the rules, regulations, or orders of the Commission, and the methods to be followed in the keeping of accounts and cost-accounting procedures and the preparation of reports, in the segregation and allocation of costs, in the determination of liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the keeping or preparation, where the Commission deems it necessary or appropriate, of separate or consolidated balance sheets or profit and loss statements for any companies in the same holding-company system.

(b) In the case of the accounts of any company whose methods of accounting are prescribed under the provisions of any law of the United States or of any State, the rules and regulations or orders of the Commission in respect of accounts shall not be inconsistent with the requirements imposed by such law or any rule or regulation thereunder; nor shall anything in this title relieve any public-utility company from the duty to keep the accounts, books, records, or memoranda which may be required to be kept by the law of any State in which it operates or by the State commission of any such State. But this provision shall not prevent the Commission from imposing such additional requirements regarding reports or accounts as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers.

(c) The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. For the purpose of its rules, regulations, or orders the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. Orders of the Commission under this title shall be issued only after opportunity for hearing.

(d) The Commission by such rules and regulations or order as it deems necessary or appropriate in the public interest or for the protection of investors or consumers, may authorize the filing of any information or documents required to be filed with the Commission under this title, or under the Securities Act of 1933, as amended, or under the Securities Exchange Act of 1934, by incorporating by reference any information or documents theretofore or concurrently filed with the Commission under this title or either of such Acts. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

EFFECT ON EXISTING LAW

SEC. 21. Nothing in this title shall affect (1) the jurisdiction of the Commission under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934 over any person, security, or contract, or (2) the rights, obligations, duties, or liabilities of any person under such Acts; nor shall anything in this title affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this title or any rule, regulation, or order thereunder.

INFORMATION FILED WITH THE COMMISSION

SEC. 22. (a) When in the judgment of the Commission the disclosure of such information would be in the public interest or the interest of investors or consumers, the information contained in any statement, application, declaration, report, or other document filed with the Commission shall be available to the public, and copies thereof may be furnished to any person at such reasonable charge and under such reasonable limitations as the Commission may prescribe: *Provided, however,* That nothing in this title shall be construed to require, or to authorize the Commission to require, the revealing of trade secrets or processes in any application, declaration, report, or document filed with the Commission under this title.

(b) Any person filing such application, declaration, report, or document may make written objection to the public disclosure of information contained therein, stating the grounds for such objection, and the Commission is authorized to hear objections in any such case where it finds it advisable.

(c) It shall be unlawful for any member, officer, or employee of the Commission to disclose to any person other than a member, officer, or employee of the Commission, or to use for personal benefit, any information contained in any application, declaration, report, or document filed with the Commission which is not made available to the public pursuant to this section.

ANNUAL REPORTS OF COMMISSION

SEC. 23. The Commission shall submit annually a report to the Congress covering the work of the Commission for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this title as it may find advisable.

COURT REVIEW OF ORDERS

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial

evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

JURISDICTION OF OFFENSES AND SUITS

SEC. 25. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", approved February 9, 1893 (D. C. Code, title 18, sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court.

VALIDITY OF CONTRACTS

SEC. 26. (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this title or of any rule, regulation, or order thereunder, and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, regulation, or order.

(c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

LIABILITY OF CONTROLLING PERSONS; PREVENTING COMPLIANCE WITH TITLE

SEC. 27. (a) It shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under the provisions of this title or any rule, regulation, or order thereunder.

(b) It shall be unlawful for any person without just cause to hinder, delay, or obstruct the making, filing, or keeping of any information, document, report, record, or account required to be made, filed, or kept under any provision of this title or any rule, regulation, or order thereunder.

UNLAWFUL REPRESENTATIONS

SEC. 28. It shall be unlawful for any person in issuing, selling, or offering for sale any security of a registered holding company or subsidiary company thereof, to represent or imply in any manner whatsoever that such security has been guaranteed, sponsored, or recommended for investment by the United States or any agency or officer thereof.

PENALTIES

SEC. 29. Any person who willfully violates any provision of this title or any rule, regulation, or order thereunder (other than an order of the Commission under subsection (b), (d), (e), or (f) of section 11), or any person who willfully makes any statement or entry in any application, report, document, account, or record filed or kept or required to be filed or kept under the provisions of this title or any rule, regulation, or order thereunder, knowing such statement or entry to be false or misleading in any material respect, or any person who willfully destroys (except after such time as may be prescribed under any rules or regulations under this title), mutilates, alters, or by any means or device falsifies any account, correspondence, memorandum, book, paper, or other record kept or required to be kept under the provisions of this title or any rule, regulation, or order thereunder, shall upon conviction be fined not more than $10,000 or imprisoned not more than two years, or both, except that in the case of a

violation of a provision of subsection (a) or (b) of section 4 by a holding company which is not an individual, the fine imposed upon such holding holding company shall be a fine not exceeding $200,000; but no person shall be convicted under this section for the violation of any rule, regulation, or order if he proves that he had no knowledge of such rule, regulation, or order.

STUDY OF PUBLIC-UTILITY AND INVESTMENT COMPANIES

SEC. 30. The Commission is authorized and directed to make studies and investigations of public-utility companies, the territories served or which can be served by public-utility companies, and the manner in which the same are or can be served, to determine the sizes, types, and locations of public-utility companies which do or can operate most economically and efficiently in the public interest, in the interest of investors and consumers, and in furtherance of a wider and more economical use of gas and electric energy; upon the basis of such investigations and studies the Commission shall make public from time to time its recommendations as to the type and size of geographically and economically integrated public-utility systems which, having regard for the nature and character of the locality served, can best promote and harmonize the interests of the public, the investor and the consumer. The Commission is authorized and directed to make a study of the functions and activities of investment trusts and investment companies, the corporate structures, and investment policies of such trusts and companies, the influence exerted by such trusts and companies upon companies in which they are interested, and the influence exerted by interests affiliated with the management of such trusts and companies upon their investment policies, and to report the results of its study and its recommendations to the Congress on or before January 4, 1937.

EMPLOYEES OF THE COMMISSION

SEC. 31. For the purposes of this title, the Commission may select, employ, and fix the compensation of such attorneys, examiners, and other experts as shall be necessary for the transaction of the business of the Commission in respect of this title without regard to the provisions of other

laws applicable to the employment and compensation of officers or employees of the United States; and the Commission may, subject to the civil-service laws, appoint such other officers and employees as are necessary in the execution of the functions of the Commission and fix their salaries in accordance with the Classification Act of 1923, as amended.

SEPARABILITY OF PROVISIONS

SEC. 32. If any provision of this title or the application of such provision to any person or circumstances shall be held invalid, the remainder of the title and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

SHORT TITLE

SEC. 33. This title may be cited as the "Public Utility Holding Company Act of 1935".